DOCKET

No. 08-660
Title: United States, ex rel. Irwin Eisenstein, Petitioner
v.
City of New York, New York, et al.
Docketed: November 19, 2008
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-3329-cv)
Decision Date: August 19, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 17 2008	Petition for a writ of certiorari filed. (Response due December 19, 2008)
Dec 9 2008	Brief of respondents City of New York, New York, et al. in opposition filed.
Dec 23 2008	Reply of petitioner United States, ex rel. Irwin Eisenstein filed.
Dec 30 2008	DISTRIBUTED for Conference of January 16, 2009.
Jan 7 2009	Supplemental brief of petitioner United States, ex rel. Irwin Eisenstein filed. (Distributed)
Jan 16 2009	Petition GRANTED The brief of petitioner is to be filed on or before Wednesday, February 25, 2009. The brief of respondents is to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 23 2009	SET FOR ARGUMENT ON Tuesday, April 21, 2009.
Feb 25 2009	Joint appendix filed. (Statement of costs filed)
Feb 25 2009	Brief of petitioner United States, ex rel. Irwin Eisenstein filed.
Feb 26 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 2 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents.
Mar 4 2009	Brief amicus curiae of Taxpayers Against Fraud Education Fund filed.
Mar 4 2009	Brief amici curiae of Patricia Haight and In Defense of Animals filed.
Mar 19 2009	CIRCULATED.
Mar 20 2009	Record received from U.S.C.A. for 2nd Circuit. (1 box)
Mar 24 2009	Brief of respondents City of New York, Michael Bloomberg, John Doe, Jane Doe filed. (Distributed)
Mar 25 2009	Motion to allow Jeffrey B. Wall, Esquire, to argue pro hac vice filed by the Solicitor General.
Mar 31 2009	Brief amicus curiae of United States filed.
Mar 31 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 3 2009	Motion of the Solicitor General to allow Jeffrey B. Wall, Esquire, to present arguement pro hac vice GRANTED.
Apr 3 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 13 2009	Reply of petitioner United States, ex rel. Irwin Eisenstein filed. (Distributed)
Apr 21 2009	Argued. For petitioner: Gideon A. Schor, New York, N.Y. For respondents: Paul T. Rephen, New York, N.Y.; and Jeffrey B. Wall, Assistant to the Solicitor General,

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PETITION FOR WRIT OF CERTIORARI

No. 08-660

Supreme Court, U.S.
FILED
NOV 17 2008
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) for filing a notice of appeal, or the 60-day time limit in Rule 4(a)(1)(B), applies to a *qui tam* action under the False Claims Act, where the United States has declined to intervene in that action.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit:

Irwin Eisenstein is the Petitioner here and was the appellant below.

The City of New York, Michael Bloomberg, John Doe, and Jane Doe are the Respondents here and were the appellees below.

The United States of America, through the United States Attorney for the Southern District of New York, filed an *amicus curiae* brief in support of appellees below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dismissing the appeal as untimely, is reported at 540 F.3d 94 (2d Cir. 2008) and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-15a. The District Court's opinion is unreported, but can be found at No. 03 Civ. 413, 2006 WL 846376 (S.D.N.Y. Mar. 31, 2006), and is reprinted in the Pet. App. at 16a-43a.

JURISDICTION

The Court of Appeals entered judgment on August 19, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. Fed. R. App. P. 4(a)(1)(A):

   "In a civil case . . . , the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

2. Fed. R. App. P. 4(a)(1)(B):

   "When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."

3. 31 U.S.C. § 3730(c)(3):

> "If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. . . . When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause."

STATEMENT OF THE CASE

This case presents the Court with an important jurisdictional question that has created a split among five circuit courts. The Second Circuit dismissed as untimely the appeal from the judgment dismissing Petitioner's *qui tam* complaint despite the fact that the notice of appeal was filed within the time limit set forth in Federal Rule of Appellate Procedure ("Rule") 4(a)(1)(B). The Second Circuit held that although the United States (the "Government") was a named party and the "real party in interest" in the suit, the 30-day rather than the 60-day time limit set forth in Rule 4 governed the timeliness of the appeal. This holding not only contravenes the plain meaning of Rule 4, but also places the Second Circuit in direct conflict with three of the other four circuit courts that have addressed this issue.

Rule 4 provides two different time limits for the filing of an appeal in a civil case – 30 days from the

entry of the judgment or order being appealed in a suit involving only private parties, and 60 days from the entry of the judgment or order being appealed in a suit where the Government is a party. *See* Fed. R. App. P. 4(a)(1)(A) and 4(a)(1)(B). The question presented in this petition is which time limit for the filing of a notice of appeal applies where the Government is a named party to the action – here a *qui tam* action – and is clearly the real party in interest, but exercises its statutory right not to intervene in the action in the district court.

To date, three of the five circuits to consider *this exact* issue – the Fifth, Seventh and Ninth – have held that, under Rule 4(a)(1)(B), a private plaintiff has 60 days to file a notice of appeal from the entry of judgment dismissing a *qui tam* action where the Government declined to intervene in the action. *See United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996). In two of these cases – *Lu* and *Haycock* – the circuit courts held that the Government is a party for purposes of Rule 4, whether it intervenes or not. *See Lu*, 368 F.3d at 775 ("The United States is a party, and that ought to be the end of the inquiry."); *Haycock*, 98 F.3d at 1102 ("the government's nominal party status combined with the majority financial interest in the outcome suffices to make it a party for purposes of the sixty day notice of appeal rule.").

Prior to the Second Circuit's decision at issue here, the only other decision to the contrary was the Tenth Circuit's majority opinion in *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978), which applied the 30-day rule because the Government declined to intervene. But even the Tenth Circuit in *Petrofsky* was divided. The dissent in *Petrofsky*, opining that a jurisdictional rule such as Rule 4 should be applied literally, concluded that the 60-day rule applies to all *qui tam* cases, whether the Government has intervened in the lawsuit or not. *See Petrofsky*, 588 F.2d at 1329 (Logan, J., dissenting). Relying on certain assertions in *Petrofksy*'s majority opinion (while ignoring the holdings in three other circuits and the conclusions of *Petrofsky*'s dissenting opinion), the Second Circuit concluded that the Government is not a party to a *qui tam* action where it declines to intervene in the district court, and that therefore the rule permitting 60 days to file a notice of appeal did not apply.

The Court should grant this petition not only to resolve the circuit conflict noted above, but also to clarify the meaning of the word "party" as it is used in Rule 4. While the Second Circuit's decision acknowledged that the Government is a named party and the "real party in interest" in any *qui tam* lawsuit, it held that the word "party," as used in Rule 4, means something more than that. (Pet. App. at 9a-10a.) Specifically, the Court held that a "party," for purposes of the rule, means "the person . . . with

control over the litigation." (Pet. App. at 8a.) Nothing on the face of Rule 4, however, suggests that the word "party" means anything other than the named party in a lawsuit. To hold that the word "party" in Rule 4 has any other meaning would contravene the plain meaning of the Rule and would be at odds with this Court's previous holdings that federal rules of procedure be given their plain meaning. *See Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540-41 (1991). Moreover, failing to adhere to the plain meaning of Rule 4 could lead to unnecessary confusion in the lower federal courts.

A. Proceedings in the District Court

On or about January 25, 2003, the Petitioner filed a complaint *pro se* in the United States District Court for the Southern District of New York against the Respondents alleging claims on behalf of the Government and himself under the *qui tam* provisions of the False Claims Act. *See* 31 U.S.C. § 3730(b)(1). The Government thereafter exercised its statutory right not to intervene in the action. Respondents moved to dismiss the complaint for failure to state a claim. In a Memorandum and Order dated March 30, 2006, the District Court granted the motion and dismissed the complaint. (Pet. App. at 42a.) Judgment was entered on April 12, 2006. (Pet. App. at 4a.) The Petitioner filed a Notice of Appeal *pro se* in the District Court on June 5, 2006 (Pet. App. at 4a) – 54 days after entry of judgment.

B. Proceedings in the Second Circuit

On December 26, 2006, the Second Circuit directed that the parties brief, among other things, the issue of whether the 30-day or the 60-day time limit for filing a notice of appeal under Rule 4 applies in a *qui tam* action where the United States has declined to intervene. On or about January 25, 2007, Respondents filed a motion to dismiss the appeal for lack of jurisdiction on the ground that the notice of appeal was not timely filed. Respondents argued that, because the Government declined to intervene in the action, the 30-day time limit under Rule 4(a) applied.

On or about March 5, 2007, the Second Circuit, recognizing that Respondents' motion presented an issue of first impression within the Circuit, entered an order *sua sponte* appointing *pro bono* counsel to file an opposition to Respondents' motion to dismiss the appeal. Specifically, the Second Circuit ordered that *pro bono* counsel address "whether th[e] 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) for filing a notice of appeal, or the 60-day time limit in Rule 4(a)(1)(B), applies to a *qui tam* action in which the United States declines to intervene. . . ." (Second Circuit Order dated March 5, 2007.) On or about May 30, 2007, the Second Circuit appointed *pro bono* counsel for the limited purpose of opposing Respondents' motion to dismiss. (Second Circuit Order dated May 30, 2007.)

On or about October 1, 2007, *pro bono* counsel filed an opposition memorandum arguing that the

Government is a party in all *qui tam* actions under the False Claims Act and that the plain meaning of Rule 4(a)(1)(B) mandates that the 60-day time limit apply to the filing of any notice of appeal from a judgment dismissing a *qui tam* action. On or about November 9, 2007, the Government filed an *amicus curiae* brief in support of Respondents' motion to dismiss. In its brief, the Government argued that it is not a party to a *qui tam* action where it has declined to intervene in the lower court, and that the instant notice of appeal, which was filed beyond the 30-day time limit set forth in Rule 4(a)(1)(A), was therefore untimely.

On or about August 19, 2008, the Second Circuit granted Respondents' motion and dismissed the appeal as untimely. The Second Circuit held that, because the Government did not intervene in the district court, it was not a party to the action within the meaning of Rule 4(a)(1)(B), and that the instant notice of appeal should have been filed within the 30-day limit under Rule 4(a)(1)(A). (Pet. App. at 7a.) In concluding that the 30-day time limit applied, the Second Circuit explicitly acknowledged that "our holding in this matter puts us in conflict with three of the four courts of appeals that have considered this issue." (Pet. App. at 13a.)

REASONS FOR GRANTING THE PETITION

This case presents an important jurisdictional question – unresolved by this Court – that has divided the circuit courts: Is the Government a party within the meaning of Rule 4(a)(1)(B) when it declines to intervene in a *qui tam* action in the district court? A negative answer to this question will undermine this Court's long-standing principle that a statute or rule be given its plain meaning.

I. The Plain Meaning of Rule 4(a)(1)(B) Mandates That All Parties to an Appeal in a *Qui Tam* Action Be Given Sixty Days to File a Notice of Appeal.

Rule 4(a)(1)(B) states: "When the United States or its officer or agency is a *party*, the notice of appeal may be filed *by any party* within 60 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(B) (emphasis added). The Second Circuit, declining to apply the plain meaning of this provision, concluded that the Government in a *qui tam* action is not a "party" within the meaning of Rule 4(a)(1)(B) where it declines to intervene in the action in the district court. There is no justifiable reason for deviating from the plain meaning of this rule, where, as here, the Government is a named party to the lawsuit. Whether the Government has declined to intervene or has exercised its statutory right to conduct the action has no impact on the Government's status as a named party to the action.

While the Second Circuit's decision acknowledged that the Government is a named party and the "real party in interest" in any *qui tam* lawsuit, it held that this status "is by itself insufficient to trigger the 60-day filing period." (Pet. App. at 10a.) The Second Circuit determined that the failure of Rule 4(a) to address situations where the Government is the "real party in interest" was not "simply an oversight" but was rather a meaningful omission. (Pet. App. at 10a.) The Second Circuit concluded that the word "party," as used in Rule 4, means "the person participating in the proceedings with control over litigation" and that the Government does not fit within this definition when it has not intervened in the district court. (Pet. App. at 8a.)

Simply put, there is no statutory or rule authority for the Second Circuit's definition of "party," and the weight of circuit authority is to the contrary. The word "party" for purposes of Rule 4 means a named party to the lawsuit. This definition easily comports with the plain meaning of the rule and has been embraced by the other circuit courts. Unlike the Second Circuit's definition, it requires no determination of whether the named party in the suit actively participated in the litigation – a determination that the Second Circuit has engrafted onto the law. Moreover, because the Government is a named party in every *qui tam* action, and remains such regardless of its decision to intervene, Petitioner's definition would result in a clear rule that the 60-day time limit applies in all *qui tam* lawsuits.

A holding that the Government is not a party for purposes of Rule 4 where it declines to intervene is not only contrary to the plain meaning of Rule; it is also at odds with the plain language of the False Claims Act. Section 3730(c) of Title 31 of the United States Code is entitled, "Rights of the *Parties* to Qui Tam Actions." 31 U.S.C. § 3730(c) (emphasis added). This provision describes the statutory rights and protections accorded to the Government in instances where it declines to intervene in the lawsuit. *See* 31 U.S.C. § 3730(c)(3). Notably, this section does not include the term "real party in interest" and does not draw any distinction between the Government as "party" and the Government as "real party in interest" – let alone base any legal rights on such a distinction.

Tellingly, while the Government is entitled to at least 75% of any award when it intervenes, the Government is entitled to at least *70%* of any award when it *does not* intervene. 31 U.S.C. § 3730(d)(1), (2). The 70% entitlement, and the trivial difference between governmental awards in cases of intervention and non-intervention, demonstrates that intervention in the *qui tam* context determines only issues of litigation management, not party status. Moreover, it is difficult to imagine the non-party that is entitled to any damages in a lawsuit, let alone to an award that is almost indistinguishable in size from an award to a party. The substantiality of the Government's award, and the substantial similarity of its entitlement regardless of intervention, shows that the

Government is indeed a party to any *qui tam* suit, even where it does not intervene.

II. The Second Circuit's Decision Reflects Disagreement Among the Circuit Courts Regarding Whether the 30-Day or 60-Day Rule Applies, Which Disagreement This Court Alone Can Resolve.

A. Conflict Among the Circuits

The circuit courts are clearly divided as to whether to apply the 30-day or 60-day time limit set forth in Rule 4 under the circumstances presented here. The Fifth, Seventh and Ninth Circuits apply the 60-day rule, and now the Second Circuit has joined the Tenth Circuit in applying the 30-day rule. The Second Circuit's decision here, almost inviting the filing of this petition, acknowledged that application of the 30-day rule put it "in conflict with three of the four courts of appeals that have considered this issue." (Pet. App. at 13a.)

B. Uncertainty Concerning the Law

The Second Circuit's decision also acknowledged that circuits that have addressed the issue here have expressed concern about the potential confusion that would result from not applying the 60-day rule uniformly to all *qui tam* suits. (Pet. App. at 14a ("Nor do we share the fear of the other courts that confusion may result from applying Rule 4(a)(1)(B) in the manner we do today.").) Although the Second Circuit

was not persuaded that its rule would cause confusion, the potential confusion caused by declining to apply the plain meaning of Rule 4 in *qui tam* suits warrants granting the instant petition.

The Second Circuit determined that Rule 4(a)(1)(B) is implicated only where the Government has actively participated in the district court litigation. (Pet. App. at 11a.)[1] Cases will arise however, where the Government's so-called participation in the lawsuit is not readily determinable. For example, the Government may decline to intervene in a *qui tam* suit initially, but then may attempt to exercise its statutory right to intervene "upon a showing of good cause" under 31 U.S.C. § 3730(c)(3). If the Government litigates the "good cause" issue in the district court, but ultimately loses and is prevented from intervening in the action, it is open to debate whether the Government "participated" in the litigation for purposes of applying the Second Circuit's holding here. Under the Second Circuit's test, resolution of this question would be difficult for both the parties and the circuit court charged with determining

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[1] The Second Circuit's decision distinguished Judge Friendly's decision in *United States v. American Society of Composers, Authors & Publishers*, 331 F.2d 117 (2d Cir. 1964), an antitrust suit brought under the Expediting Act, from the case where the Government declines to intervene in a *qui tam* suit. According to the Second Circuit's decision here, the "government [in *American Society*] actively participated in the ensuing litigation." (Pet. App. at 11a.)

whether the Government is in fact a party under Rule 4.

Another point of confusion could result from the Second Circuit's analysis of the 1946 Advisory Committee Note to Rule 4's predecessor rule (the "Note"). (Pet. App. at 10a-11a.) According to the Note, the rationale for permitting the Government 60 rather than 30 days to file an appeal is that "the government's institutional decision-making practices require more time to decide whether to appeal." (Pet. App. at 10a.) The Note further states that, in the interests of fairness, "the same time should be extended to other parties in a case in which the government is a party." (Pet. App. at 10a.) The Second Circuit determined that the rationale underlying the Note is clearly not applicable in cases, such as this one, where the Government declines to intervene. (Pet. App. at 11a.) The Second Circuit stated that there is simply no basis for applying the 60-day rule when the parties "are aware the government has disclaimed any participation in the suit." (Pet. App. at 15a.)

The Second Circuit's analysis, however, fails to address situations where the Government had been a defendant in a lawsuit involving private co-defendants and a private plaintiff but then was dismissed or removed from the action, and the plaintiff appeals only as against the private defendants. The Government's institutional decision-making process, as described in the Note, is clearly not implicated in such a situation insofar as the Government will not participate in any appeal. Yet the private parties

remaining in the action have 60, not 30, days in which to appeal. *See Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1011-12 (8th Cir. 1984) (applying 60-day rule where claims against Government in district court were transferred to United States Court of Claims and only private parties remained in suit at time judgment being appealed was entered). The Second Circuit's rationale, to the extent that it is based on the Government's decision-making process, is accordingly unpersuasive.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

August Term, 2007

(Argued: June 24, 2008 Decided: August 19, 2008)

Docket No. 06-3329-cv

UNITED STATES OF AMERICA, *ex rel.* IRWIN EISENSTEIN,

Plaintiff-Appellant,

– v. –

CITY OF NEW YORK, MICHAEL BLOOMBERG, JOHN DOE, JANE DOE,

Defendants-Appellees.

Before: WINTER, MINER, and CABRANES, *Circuit Judges*

Motion to dismiss an appeal from the dismissal of a complaint by the United States District Court for the Southern District of New York (Deborah A. Batts, *Judge*). Appellant brought a False Claims Act *qui tam* action in the name of the United States. Appellant filed a notice of appeal more than 30 days after the dismissal. Appellees move to dismiss the appeal as untimely, arguing that because the United States is not a party, the notice of appeal was required to have been filed within 30 days of final judgment, Fed. R. App. P. 4(a). The motion to dismiss is granted.

LEWIS D. ZIROGIANNIS (Marc A. Weinstein *on the brief*) Hughes Hubbard & Reed LLP, New York, New York *for Plaintiff-Appellant.*

ANDREW G. LIPKIN, of counsel (Michael A. Cardozo, Corporation Counsel of the City of New York) New York, New York *for Defendant-Appellees.*

Michael J. Garcia, United States Attorney for the Southern District of New York (Sheila M. Gowan and Jeffrey S. Oestericher, Assistant United States Attorneys, *on the brief*) New York, New York, *for amicus curiae*, the United States of America.

WINTER, *Circuit Judge*:

Irwin Eisenstein appeals from the dismissal of his complaint by Judge Batts. The City of New York has moved to dismiss the appeal, asserting that the notice of appeal was untimely. The issue is whether a private party bringing a False Claims Act *qui tam* action must file a notice of appeal within the 30 days after judgment applicable to civil actions generally, Fed. R. App. P. 4(a)(1)(A), or within the 60 days applicable when the United States is a party, Fed. R. App. P. 4(a)(1)(B). We hold that, where the United States has declined to intervene in a False Claims action, the United States is not a party to the action within the meaning of Rule 4(a)(1), and, therefore, a notice of appeal must be filed within 30 days. Because Eisenstein filed his notice of appeal more than 30

days after the entry of judgment, his appeal is untimely, and we are without jurisdiction to consider it.[1]

On January 17, 2003, Eisenstein and four City employees, proceeding *pro se*, filed this action against the City and various municipal officials. The gravamen of the complaint is that it is unlawful for the City, as a condition of employment, to require non-resident City-employees to pay a fee equivalent to the municipal income taxes paid by resident City-employees. The complaint alleges that this practice is actionable under various theories of liability, most notably as a violation of the False Claims Act, 31 U.S.C. §§ 3729-3733.[2] Eisenstein contends that because non-resident employees are able to deduct this fee as an expense for federal income tax purposes, their taxable income is less than it might otherwise be, and in this way, the City is depriving the federal government of tax revenue. The complaint initiates a

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[1] Our decision in *United States ex rel. Mergent Services and John Bal* filed this day, holds that *pro se* litigants may not pursue *qui tam* actions under the False Claims Act. That principle would also bar this suit, but we would have to have appellate jurisdiction in this matter to reach that issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause.") (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)).

[2] The False Claims Act imposes civil liability upon "any person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). Defendants may be liable for treble damages and a civil penalty of up to $10,000 per claim. *Id.*

qui tam action, in which the plaintiffs are to serve as relators, suing the City in the name of the United States. The United States declined to intervene.[3]

The City moved to dismiss the complaint for failure to state a claim. On March 31, 2006, the district court granted the motion to dismiss, and, on April 12, 2006, rendered final judgment for the City. On June 5, 2006, or 54 days later, Eisenstein filed his notice of appeal.[4]

On December 26, 2006, we ordered Eisenstein and the City "to brief the issue of whether the thirty-day time limit for filing a notice of appeal . . . or the sixty-day time limit for filing a notice of appeal . . . , which applies when the United States is a party,

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[3] An action brought under the False Claims Act may be commenced in one of two ways. First, the federal government itself may bring a civil action against a defendant. 31 U.S.C. § 3730(a). Second, as is the case here, a private person, or "relator" may bring a *qui tam* action "for the person and for the United States Government," against the defendant, "in the name of the Government." *Id.* § 3730(b)(1). Under such circumstances, the Government may elect to intervene, and if it recovers a judgment, the relator gets a percentage. *See id.* § 3730(d)(1). If the Government declines to intervene, the relator may pursue the action on his own, and may get a larger percentage of the judgment if he prevails. *See id.* § 3730(d)(2); *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 265 (2d Cir. 2006).

[4] The only notice of appeal specifies that Eisenstein is appealing the judgment of the district court. *See* Fed. R. App. P. 3(c)(1)(A) (requiring that the notice of appeal "specify the party or parties taking the appeal by naming each one in the caption or body of the notice"). Therefore, he is the only appellant.

applies to a *qui tam* action where the United States declines to intervene in the proceedings." *United States ex. rel. Eisenstein v. City of New York,* No. 06-3329 (2d Cir. Dec. 26, 2006). We also ordered the United States to brief this issue as *amicus curiae.* On January 25, 2007, the City filed the present motion to dismiss, based on, *inter alia,* the timeliness issue. Thereafter, we appointed *pro bono* counsel for Eisenstein, solely to address the City's motion to dismiss.

The government played no role in this litigation until filing an *amicus* brief as ordered by the court.[5] Because we conclude that the United States is not a "party" to this action for the purposes of Fed. R. App. P. 4(a)(1)(A) and (B), we further conclude that Eisenstein's notice of appeal was untimely. We are therefore without jurisdiction, and the City's motion is granted.

"[I]n a civil case, . . . the notice of appeal . . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A); *see* 28 U.S.C. § 2107(a) (prescribing that "no appeal shall bring any judgment . . . of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment"). However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within

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[5] That brief urges us to apply the 30 day rule of Fed. R. App. P. 4(a)(1)(A).

60 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(B); *see* 28 U.S.C. § 2107(b) (providing that "[i]n any [civil] action . . . in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry"). The term "party" is not expressly defined for these purposes by either statute or the appellate rules.[6]

When interpreting a rule of procedure, we review the text for its "plain meaning." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990); *see also United States v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007). To the extent that the text is ambiguous, we seek to determine the intent by looking to other materials, such as the Advisory Committee Notes that often accompany the rules. *See Sorensen v. City of New York*, 413 F.3d 292, 296 (2d Cir. 2005).

In the present case, the language of Rule 4(a)(1)(B) does not support Eisenstein's contention that he was entitled to file his notice of appeal within 60 days of the rendering of judgment. The text of Rule 4(a)(1)(B) states that the extended filing period applies when the United States is a "party" to the

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[6] "Compliance with Rule 4(a) is 'mandatory and jurisdictional.'" *Williams v. KFC Nat'l Mgmt. Co.*, 391 F.3d 411, 415 (2d Cir. 2004) (quoting *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978)). That is, "[i]f a notice of appeal is filed beyond the period allowed by [Rule 4(a)], the court of appeals lacks subject matter jurisdiction to hear the appeal." *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 116 F.3d 53, 56 (2d Cir. 1997).

action. We hold that the United States is not a "party" to this action for the purposes of the deadline for filing a notice of appeal.

In our view, the United States is not a party for these purposes to a *qui tam* action when the government fails to intervene or to raise or resist any legal claim. Where a private person brings suit under the False Claims Act, the Act allows the government "to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information." 31 U.S.C. § 3730(b)(2). Before that 60-day period expires, the Act mandates that the government carry out one of two choices: "(A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4). While the Act allows the Government to intervene at a later date, it may do so only upon a showing of good cause. *Id.* § 3730(c)(3). When the Government declines to intervene, the Act specifies that the person who brought the suit has the "right to conduct the action." *See id.* § 3730(c)(3). Absent a specific request, the government need not be served with the pleadings thereafter filed by litigants. *Id.* § 3730(c)(3). Moreover, the United States "is not liable for expenses which a person incurs in bringing an action under" the Act, *id.* § 3730(f), notwithstanding the fact that the claim is that of the United States and that such actions are brought in the name of the United States.

See 31 U.S.C. § 3730(b); *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (describing claims under the Act as belonging to the United States). And while under the Act, the government must consent to any settlement that would call for the dismissal of a *qui tam* action, *see id.*, this is surely a sensible requirement, inasmuch as the United States, is the "real party in interest," and is otherwise bound by the relator's actions for purposes of *res judicata* and collateral estoppel. *See Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126 (9th Cir. 2007).

These provisions indicate that the United States is not a party to litigation for all purposes brought by private persons under the Act, absent an election to intervene. As used in Rule 4(a)(1), the word "party" refers to the person participating in the proceedings with control over litigation. The government, once having declined to intervene at the outset of an action may not participate in it, save for asking that it be served with pleadings and for approving any withdrawal with prejudice, without moving to intervene upon a showing of good cause. The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation.

Eisenstein argues that the extended 60-day filing period applies here because the United States is a "real party in interest" in False Claims Act *qui tam* actions. *See United States ex rel. Stevens v. Vt. Agency of Natural Res.*, 162 F.3d 195, 202 (2d Cir. 1998), *rev'd*

on other grounds, 529 U.S. 765 (2000). This argument assumes that the United States' status as a "real party in interest" is equivalent to the status of a "party" to litigation as contemplated by the drafters of Rule 4(a). We find this assumption faulty. "Generally, the 'real party in interest' is the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit." *In re Comcoach Corp.,* 698 F.2d 571, 573 (2d Cir. 1983). The litigation status of a real party in interest and a "party" to litigation may overlap for some purposes while being quite distinct for others. *See, e.g., Arkwright-Boston Mfrs. Mut. Ins. Co. v. New York,* 762 F.2d 205, 209 (2d Cir. 1985) (concluding it was not error to fail to join a real party in interest as a plaintiff to a diversity action). Indeed, the term "real party in interest" exists only to distinguish the litigation interests it covers from those of a "party" who is the person responsible for prosecuting the action. The use of the "real party in interest," as a term of art, permits courts to intelligibly discuss those instances in which an individual with a substantive right must appear as a party to litigate a claim, and those instances in which another may appear in his stead. *Compare Local Union No. 17 v. Mason & Hanger Co.,* 217 F.2d 687, 691-95 (2d Cir. 1954) (concluding that a union was not entitled under the Labor Management Relations Act to bring a civil conspiracy claim on behalf of its members, the real parties in interest), *with Blau v. Lamb,* 314 F.2d 618, 619-20 (2d Cir. 1963) (providing that the real party in interest, a corporation, need not be the one to bring a

claim under Section 16(b) of the Securities Exchange Act of 1934). Accordingly, the United States' status as a real party in interest is by itself insufficient to trigger the 60-day filing period.

The failure of Rule 4(a)(1)(b)'s language to include situations in which the United States is a "real party in interest" in an action cannot be viewed as simply an oversight. The term "real party in interest" is a term of art used in the rules of procedure. *See* Fed. R. Civ. P. 17(a)(1) (requiring that actions be brought in the name of the "real party in interest"); Fed. R. Civ. P. 15 Notes of Advisory Committee on 1966 amendments (noting that under the rules, there is mechanism for correcting a failure to name the "real party in interest" to an action). We therefore regard the omission of "real party in interest" from Rule (a)(1)(B) as meaningful.

We turn now to the intent underlying Rule 4(a)(1)(B). The purpose of providing a 60-day filing period, rather than the usual 30 days, is to account for the slow machinery of government when the United States is a party responsible for prosecuting the action. "The Advisory Committee's Notes of 1946 to Rule 73(a) of the Federal Rules of Civil Procedure, the predecessor of Rule 4(a), explain that the government's institutional decisionmaking practices require more time to decide whether to appeal and that in fairness, the same time should be extended to other parties in a case in which the government is a party." *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 306 (5th Cir. 1999)

(citing 20 *Moore's Federal Practice* § 304.11 (3d ed. 1997)).[7] This rationale is obviously inapplicable to the present case, where the government has played no part in the underlying litigation other than to decline to participate in it.

Our decision is not inconsistent with *United States v. American Society of Composers, Authors & Publishers,* 331 F.2d 117 (2d Cir. 1964). In *American Society of Composers,* we applied the 60-day limit, but only because the United States actively participated in the litigation. In that matter, several television stations sought an order requiring the licensing of the rights to use various musical compositions, rights that were held by the American Society of Composers, Authors and Publishers (the "Society"). *Am. Soc'y of Composers,* 317 F.2d 90, 91 (2d Cir. 1963). The stations sought these licenses purportedly pursuant to a consent decree entered in a previous action brought by the United States against the Society under the Sherman Act. *Id.* The government actively participated in the ensuing litigation, weighing in on the justiciability of the stations' claims before the district court, 208 F. Supp. 896, 897 (S.D.N.Y. 1962), and on appeal, 331 F.2d at 120.

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[7] This rationale applies with respect to Rule 4(a)(1)(B), which is derived from the former Rule 73(a) "without any change of substance." Fed. R. App. P. 4 Notes of Advisory Committee on 1967 Adoption of Subdivision (a).

When a dispute arose as to the timeliness of an appeal raising issues that pertained only to the claims brought by the television stations and the Society and not to the antitrust claims of the United States resolved in the consent decree, *id.* at 119-20, we interpreted the predecessor to Rule 4(a) and concluded that the 60-day filing period applied. In doing so, we relied on the text of the former rule, which provided a 60-day period to file an appeal in any action "in which the United States or an officer or agency thereof is a party." *Id.* at 119 (citing the former Fed. R. Civ. P. 73(a)). Because the rule required only that the United States be a party for the 60-day period to apply, we rejected the notion that this longer filing period was triggered only when the United States had a particular interest in the outcome of the appeal. *Am. Soc'y of Composers,* 331 F.2d at 119. In so doing, we cautioned that it is "undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language." *Id.*

This sound principle is entirely consistent with our ruling today. Rather than establishing filing deadlines based on the nature of, or interests in, the claims asserted on appeal, we look, as we did in *American Society of Composers,* to the plain requirements of the rules, which call for a determination of whether the United States was a party in the district

court. That is, what is of import is neither that Eisenstein brought a False Claims Act claim in the name of the United States, nor that the United States may be entitled to a portion of the recovery if Eisenstein prevails; what is of import is that the United States played no role in this matter before the district court.

We do note that our holding in this matter puts us in conflict with three of four courts of appeals that have considered this issue. *See United States ex rel. Lu v. Ou,* 368 F.3d 773, 775 (7th Cir. 2004) (applying the 60-day limit); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999) (same); *United States ex rel. Haycock v. Hughes Aircraft Co.,* 98 F.3d 1100, 1102 (9th Cir. 1996) (same); *compare United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy,* 588 F.2d 1327, 1329 (10th Cir. 1978) (per curiam) (applying the 30-day limit). Specifically, in *Hughes Aircraft,* the Ninth Circuit concluded that in False Claims Act *qui tam* cases, the application of the 60-day period was required under a "literal interpretation" of Rule 4(a), and that such an interpretation was called for in the interest of affording would-be appellants the ability "to figure out which time period applies, easily, without extensive research, and without uncertainty." *Hughes Aircraft Co.,* 98 F.3d at 1102. Confronted with this same issue, the Fifth Circuit has since adopted the Ninth Circuit's reasoning from *Hughes Aircraft. See Epic Healthcare Mgmt. Group,* 193 F.3d at 308.

We are not similarly persuaded. As discussed in detail *supra,* we do not agree that a "literal" reading

of Rule 4(a) accords a 60-day filing period to private individuals who bring suit in the name of the United States. Nor do we share the fear of other courts that confusion may result from applying Rule 4(a)(1)(B) in the manner we do today. In the circumstances described, counsel of minimal competence will take pause upon reading Rule 4(a) to consider whether the United States was actually a "party" to the action. Even if doubt existed, any reasonable counsel would allay these concerns by sensibly filing a notice of appeal within 30 days. In fact, there is little history of confusion, and, even with this decision, the issue has not arisen in the majority of circuits despite the many decades in which the provisions of Rule 4(a)(1)(B) and False Claims Act *qui tam* actions have coexisted.

We are similarly not persuaded by the reasoning employed by the Seventh Circuit in *United States ex rel. Lu v. Ou.* In addition to reciting the grounds relied upon by the Ninth and Fifth Circuits in *Hughes Aircraft* and *Epic Healthcare,* the Seventh Circuit appears to have concluded that the United States must be a party to *qui tam* actions because relators by themselves lack standing to sue. *Ou,* 368 F.3d at 775. Respectfully, we believe this reasoning cannot be reconciled with the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex. rel. Stevens,* 529 U.S. 765 (2000).

In *Stevens,* the Supreme Court specifically identified the source of relator-standing in False Claims Act *qui tam* actions, concluding that relators have standing to sue not as agents of the United States, but as

partial-assignees of the United States' claim to recovery. *Stevens,* 529 U.S. at 773-74. This is so even where the assignor, the United States, declines to intervene in the case. *See id.* at 770 (noting the Government's failure to intervene). According to *Stevens,* relators have standing in their own right, *id.* at 773-74, and, therefore, if they otherwise comply with the requirements of the False Claims Act, they can bring an action in the name of the United States without the United States appearing as a party and participating in the litigation.

Ultimately, we are more inclined to agree with the views of the Tenth Circuit, the first court of appeals to have taken up this issue. *See Van Cott,* 588 F.2d at 1329. In *Van Cott,* as in the present case, the government declined to intervene in a *qui tam* action, and, as a result, a relator pursued a False Claims Act claim on his own. *Id.* at 1328. Under such circumstances, the Tenth Circuit properly characterized the United States' participation in the case as "tangential or nominal," and soundly recognized that it "was merely a statutory formality" that the relator brought the suit in the name of the United States. *Id.* at 1329. We also agree with its observation that, under such circumstances, "[a]ll parties [are] aware the government [has] disclaimed any participation in the suit" and that there is no "need for more than the usual 30 days to make the appeal." *Id.*

We therefore grant the City's motion to dismiss.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES
OF AMERICA ex. rel.
IRWIN EISENSTEIN, *et al.*,

Plaintiff,

- against -

THE CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE AND JANE DOE,

Defendants.

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03 Civ. 413 (DAB)
MEMORANDUM & ORDER

(Filed Mar. 31, 2006)

DEBORAH A. BATTS, United States District Judge.

Pro se Plaintiff Irwin Eisenstein ("Eisenstein") commenced this action against Defendants City of New York and Mayor of the City of New York, Michael Bloomberg, (collectively "City" or "Defendants") claiming that Section 1127 of the New York City Charter violates (1) the False Claims Act, 31 U.S.C. § 1329, (2) the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution (3) the Commerce Clause of Article I, Section 8 of the United States Constitution, and (4) Section 220 of the New York Code of Labor Law.[1]

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[1] Throughout his Complaint, Eisenstein hints that Defendants have violated other federal provisions. (*See, e.g.*, Compl. at 10 ("The State law violations include but are not limited to. . . .").) The Court's role is not to consider every possible statutory and

(Continued on following page)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants have moved to dismiss all claims against them for failure to state a claim upon which relief can be granted.

For the reasons stated below, Defendants' Motion to Dismiss is GRANTED on all claims.

I. BACKGROUND

Eisenstein, who once resided in New Jersey, now lives in New York City. (Compl., App. A. at 3.) During part of the time that he lived in New Jersey, he was employed by the City of New York. Eisenstein alleges that, pursuant to Section 1127 of the New York City Charter ("Section 1127"), he was forced to agree to pay a portion of his income to the City.[2] Section 1127 requires all non-resident City employees to agree to make such payments.

Each payment equaled the difference between the income tax he owed to his city of residence in New Jersey, and the income tax he would owe to New York

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constitutional claim for Plaintiff's alleged injury. Accordingly, the Court considers only the causes of action listed in the Complaint as "First Cause of Action," "Second Cause of Action," "Third Cause of Action," and "Fourth Cause of Action". (Compl. at 15-16.)

[2] At the date Plaintiff filed this Complaint, Plaintiff resided in Brooklyn, New York. (Compl. at 3.) However, it appears from the Complaint that he seeks compensation for the payments he made when, prior to that date, he lived out-of-state. (Compl. App. A at 3-5.)

City if he resided there. Specifically, Section 1127 provides that:

> every person seeking employment with the City of New York . . . shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual . . . during employment by the city, such person will pay the city an amount by which a city personal income tax on residents computed and determined as if such person were a resident individual . . . during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period.

Section 1127 of the New York City Charter.

Eisenstein's allegations based on Section 1127 are threefold. First, he challenges having to make these payments to the City in the first instance. He disagrees with having to make payments from his paycheck to both the city where he lives (in New Jersey) and the city where he works (New York). According to Eisenstein, a City employee should not be penalized with a "discriminatory tax" because he chooses to live in a state with lower income tax rates.

Second, Eisenstein challenges having to pay more taxes to the federal government. On their federal tax returns, City residents may deduct from their reported income one-hundred percent of their City income tax payments. (Compl. at 11.) Non-residents, however, may deduct only thirty-eight

percent of their Section 1127 payments, since those payments are deemed a mere "business expense". (Compl. at 11.) As a result, Eisenstein reported a higher adjusted income on his federal tax returns than his colleagues who live in the City. He was in a higher federal tax bracket than they, and owed more federal income taxes.

Third, nevertheless Eisenstein turns around and contends that non-resident City employees ought to pay *more* money to the federal government. When non-residents deduct a portion of their Section 1127 payments from their federal gross income, what results is a decrease in the amount of income that the federal government can tax. Eisenstein submits that Section 1127 violates the False Claims Act because Section 1127 hoodwinks the Government out of tax revenue.

Defendants have moved to dismiss all claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[3] They contend that the Complaint fails to allege a claim upon which relief can be granted.

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[3] Eisenstein erroneously characterized the motion at issue as one for summary judgment (*See* Notice of Motion, Jun. 27, 2003). Due to the lenient standards for *pro se* litigants, the Court construes Eisenstein's June 27, 2003 Memorandum of Law as a response in opposition to Defendants' Motion to Dismiss. Indeed, Eisenstein's brief is responsive to the points raised by the City in the Motion to Dismiss.

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court may dismiss a complaint if the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). On a Rule 12(b)(6) motion to dismiss, "the court must accept as true the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff." *Bolt Elec., Inc. v. City of New York,* 53 F.3d 465, 469 (2d Cir. 1995) (*citing Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 163, 113 S. Ct. 1160 (1993) *and Walker v. City of New York,* 974 F.2d 293, 298 (2d Cir. 1992)). A district court "should grant such a motion only if, after viewing plaintiff's allegations in [a] favorable light, 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Walker,* 974 F.2d at 298 (*quoting Riciutti v. New York City Transit Auth.,* 941 F.2d 119, 123 (2d Cir. 1991)). *See also Chance v. Armstrong,* 143 F.3d 698, 701 (2d Cir. 1998) (*quoting Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct 99, (1957)). However, "[w]here the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint in regard to that defendant should be granted." *Morabito v. Blum,* 528 F. Supp. 252, 262 (S.D.N.Y. 1981) (*citing Gutierrez v. Vergari,* 499 F. Supp. 1040, 1052 (S.D.N.Y. 1980)); *Holloway v. Carey,* F. Supp. 551, 553 (S.D.N.Y. 1979).

Pro se plaintiffs merit more leniency under the Rule than do Plaintiffs represented by counsel. Legal documents submitted by *pro se* plaintiffs are held to "less stringent standards than formal pleadings drafted by lawyers." *Hughes v. Rowe,* 449 U.S. 5, 9, 101 S. Ct. 173 (1980). The Court must "'interpret [the *pro se* Complaint] to raise the strongest argument that [it] suggests.'" *Soto v. Walker,* 44 F.3d 169, 173 (2d Cir. 1995) (*quoting Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir. 1994)). *See also Hernandez v. Coughlin,* 18 F.3d 133, 136 (2d Cir. 1994), *cert. denied,* 513 U.S. 836 (1994) ("This standard is applied with even greater force . . . where the complaint is submitted *pro se.*").

III. CAUSES OF ACTION

A. The False Claims Act, 31 U.S.C. § 3729

Eisenstein challenges Section 1127 under the False Claims Act, 31 U.S.C. § 3729. The False Claims Act ("FCA") imposes penalties upon any person who "knowingly presents . . . to . . . the . . . government . . . a false or fraudulent claim for payment." Specifically, a person violates the FCA when she or he:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorizes to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government. . . .

31 U.S.C. § 3729(a).

The False Claims Act authorizes a private person to bring a *qui tam* civil action in the name of the federal government against any person who violates the FCA. *See generally Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 120 S. Ct. 1858 (2000) (holding that the False Claims Act has in mind private persons who, on behalf of the Federal Government, bring suit against parties engaged in fraudulent conduct).[4] Municipal corporations, like New York City, are not immune from such *qui tam* actions. *Cook County, Ill. v. United States ex rel. Chandler,* 538 U.S. 119, 129, 123 S. Ct. 1239 (2003).

"It seems quite clear that the objective of Congress [in enacting the FCA] was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon

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[4] The private person, known as the relator, commences an FCA action by filing the Complaint and giving the Government an opportunity to intervene. The Government, in Eisenstein's case, opted not to intervene. (*See* Government's Notice to Decline Intervention, dated Feb. 24, 2003.) If the Government declines intervention, the relator may proceed with the action on the Government's behalf. *See id.* at § 3730(c)(3). In either case, the relator will be entitled to a percentage of any award recovered. *See id.* at § 3739(d). *See generally U.S. rel. Drake v. Norden Systems, Inc.,* 375 F.3d 248 (2d Cir. 2004); *Vt. Agency of Natural Res.,* 529 U.S. 765, 774-78, 120 S. Ct. 1858 (2000) (providing comprehensive discussion on the long-recognized validity of *qui tam* actions in American and English legal histories).

which such claims were made." *Rainwater v. United States,* 356 U.S. 590, 592, 78 S. Ct. 946 (1958).[5]

The Supreme Court has cautioned against expansively reading the FCA's text. When interpreting the FCA, "[the] provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." *United States v. McNinch,* 356 U.S. 595, 598, 78 S. Ct. 950 (1958).

At the core of any conduct violating the FCA is a fraudulent communication.[6] *Mikes v. Straus,* 274 F.3d 687, 696 (2d Cir. 2001). Though the terms "false" and "fraudulent" are not expressly defined in the Act, this Circuit applies to the FCA the following common definition for "fraud": "an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance upon it to part with

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[5] Congress passed the FCA in 1863 to respond to disclosure of widespread fraud against the Government during the Civil War. *Rainwater v. United States,* 356 U.S. 590, 592, 78 S. Ct. 946 (1958). "The Union government had been billed for nonexistent or worthless goods, had been charged exorbitant prices, and had its treasury plundered by profiteering defense contractors." *Mikes v. Straus,* 274 F.3d 687, 692 (2001) (*citing United States v. McNinch,* 356 U.S. 595, 599, 78 S. Ct. 950 (1958).

[6] Though Eisenstein's Complaint does not make clear under which subpart of the FCA he challenges the City's conduct, a complaint under any of the FCA's subparts must allege that a defendant has made a false or fraudulent communication to the Government. *Mikes v. Straus,* 274 F.3d 687, 696 (2d Cir. 2001).

some valuable thing belonging to him or to surrender a legal right." *Id.* (*citing Webster's Third New International Dictionary* 904 (1981)). "False" under the FCA means "not true," "deceitful," or "tending to mislead." *Mikes,* 274 F.3d at 696.

None of Eisenstein's allegations indicate that the City engaged in conduct which meets the Second Circuit's definition of fraud. Nothing indicates that the City intentionally misrepresented or concealed information, or that Defendants have a purpose of inducing the federal government to part with its funds. The Court agrees with Defendants that Eisenstein raises no facts in his Complaint which make out any of the elements set forth in the FCA. (*See* D's Mot. to Dismiss at 6.)

Worth noting is Rule 9(b) of the Federal Rules of Civil Procedure. This rule requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." While this Rule goes on to provide that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally," the mandate of the Rule is that a complaint alleging fraudulent conduct must allege such conduct with particularity.

It is well-settled in the Second Circuit and elsewhere that Rule 9(b) applies to the FCA. *See Gold v. Morrison-Knudsen Co.,* 68 F.3d 1475, 1476 (2d Cir. 1995) (applying Fed R. Civ. P. 9(b)'s heightened pleading requirements to the False Claims Act). *See*

also U.S. ex rel. DeCarlo v. Kiewit/AFC Enterprises, 937 F. Supp. 1039, 1049 (S.D.N.Y. 1996); *U.S. ex rel. McCready v. Columbia/HCA Healthcare Corp.,* 251 F. Supp. 2d 114, 116 (D.D.C. 2003); *U.S. ex rel. Bahrani v. ConAgra, Inc.* 183 F. Supp. 2d 1272, 1279 (D. Colo. 2002); *U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.,* 255 F. Supp. 2d 351, 407 (E.D. Pa. 2002).

When applying Rule 9(b) to the FCA, "[a] complaint alleging fraud must "'(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *DeCarlo,* 937 F. Supp. at 1049 (applying this four-part requirement to the FCA). *See also Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir. 1994) (*quoting Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir. 1993)) (laying out the Rule 9(b) four-part test for fraud claims generally).

Eisenstein's Complaint does not meet this test. He fails to specify whether Section 1127 agreements, or non-resident City employees' federal tax returns, or other documents altogether are what constitute the fraudulent statements. He does not allege that Defendants made a false claim or statement to the government for payment, conspired to make a false claim, or caused false records to be employed to defraud the Government. Instead, we can presume from the Complaint only that residents and nonresidents report their City taxes and Section 1127

payments on their federal income tax returns in accordance with federal tax instructions.

Eisenstein, who complains about having to pay more money to the federal government than municipal workers living in the City in his second "problem" with Section 1127, is hardly a credible relator on his *qui tam* claim. However, the law about which he complains is in the federal tax code, not the New York City Charter. The Federal Government, he seems to say, is defrauding itself out of tax revenue. But the City need not answer to the Federal Government's decision on how to account for Section 1127 payments and City taxes. How to generate federal tax revenue is up to the Federal Government, and the Federal Government alone.

The fact of the matter is that nothing in Eisenstein's Complaint indicates that any Defendant has wielded Section 1127 to procure federal funds by fraudulent means.[7] There is nothing surreptitious

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[7] Eisenstein's most focused charge relating to the effect of Section 1127 on the Government is this: "The result is that [nonresident City employees'] deduction is larger on the Federal tax returns and they pay less in Federal Taxes. An example of this type of process follows:

"If a person earns $20,000 and

"Pays $2000 as a City tax, their income is reduced and they pay taxes to the Federal government based upon $18,000 (This would not change)

"The non-resident uses the $2000 collected by the City under [Section 1127] as a business expense, and that results in a reduction of income of:

(Continued on following page)

about the City Charter. There is nothing undisclosed about the City tax code. Indeed, all of these laws are on the public record. There is, consequently, no fraudulent conduct involved here.

Under the FCA, where a plaintiff fails to allege that the defendant makes a false or fraudulent statement which caused the Government to pay money or which allowed defendant to deprive the Government of money owed, dismissal is proper. *U.S. v. Richard Dattner Architects,* 972 F. Supp. 738, 747 (S.D.N.Y. 1997). *See also Moor-Janowski v. Bd. of Trustees of New York Univ.,* 1998 WL 474084 *12 (S.D.N.Y. 1998) (dismissing FCA claim for failure to allege facts with sufficient particularity).

Rule 9(b)'s particularity standard may be read more broadly for *pro se* complainants, but it still requires of them a degree of specificity. *See Richard Dattner Architects,* 972 F. Supp. at 747 (applying Rule 9(b) particularity standards to *pro se* plaintiff alleging violation of the FCA). Even affording Eisenstein extra

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"20,000 - (.28 x 2,000) or $560 and they pay income tax on "$21,440.

"If the amount removed from their salary was less, the expense would be smaller, and more income would be available for Federal taxation. . . . The Federal government would benefit since the amount that would be used for Federal tax would not include the same large expense." (Compl. at ¶ 560.)

This allegation merely refers to a hypothetical "person" who pays taxes. It specifies neither an actual statement nor a fraudulent purpose held by the Defendants.

latitude, his Complaint cannot satisfy the particularity requirements of Rule 9(b). The Court must read a *pro se* complaint as raising the "strongest arguments that [it] suggests," *Soto,* 44 F.3d at 173 (*quoting Burgos,* 14 F.3d at 790), but when no averments in the Complaint allege – much less suggest – that the Government knowingly withheld or falsified information, the *pro se* Complaint cannot survive a motion to dismiss.

For these reasons, Defendants' Rule 12(b)(6) Motion to Dismiss Eisenstein's FCA claim is GRANTED.

B. Privileges and Immunities Clause

Eisenstein also looks to the Privileges and Immunities Clause for relief from Section 1127. The Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, provides that "[t]he Citizens of each State shall be entitled to the Privileges and Immunities of the Citizens in the several States." The purpose of the Privileges and Immunities Clause is to "strongly . . . constitute the citizens of the United States as one people," by "plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding et ux. v. New York Tax Appeals Tribunal,* 522 U.S. 287, 296, 118 S. Ct. 766 (1998) (*quoting Paul v. Virginia,* 75 U.S. 168, 180, 19 L. Ed. 357, 8 Wall. 168 (1868)).

As a preliminary matter, the Supreme Court has held that a municipal ordinance can be challenged under the Privileges and Immunities Clause. *United Bldg. and Constr. Trade Council v. Mayor and Council of the City of Camden,* 465 U.S. 208, 214, 104 S. Ct. 1020, 79 L. Ed. 2d 249 (1984) ("the fact that the ordinance in question is a municipal, rather than a state, law does not somehow place it outside the scope of the Privileges and Immunities Clause").

In order to succeed on a Privileges and Immunities challenge a Plaintiff must establish that (1) the right being burdened is "fundamental" and thus protected by the Clause, *see Baldwin v. Montana Fish and Game Comm'n,* 436 U.S. 371, 383, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978), and (2) if the right is protected, the Court must then consider whether there are "substantial" reasons for the discrimination and whether the degree of discrimination bears a close relation to them. *Toomer v. Witsell,* 334 U.S. 385, 396, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).

Eisenstein's Complaint fails to allege facts that would satisfy either prong of this two-part analysis. Even a liberal construction of the Complaint does not make clear which of Eisenstein's fundamental rights the Defendants have allegedly burdened. As Defendants point out, the Complaint alleges some facts – namely the existence of Section 1127 and its effect on hypothetical parties – but then only proffers conclusory allegations that the Privileges and

Immunities Clause has been violated.[8] (D's Mot. to Dismiss at 16.)

To be sure, Eisenstein may be suggesting that his right to equal pay has been burdened. He suggests this in two ways. First, he indicates that the City demands more money from non-resident than from resident City employees. But Section 1127 actually serves to *equalize* parties. Section 1127 requires all City employees ultimately to pay out the same total amounts from their paychecks.

The second way Eisenstein suggests that his right to equal pay has been burdened is by pointing to the disparate incomes reported by resident and non-resident City employees on their federal tax returns. According to the Complaint, a resident City employee may deduct his entire City income tax from the gross income he reports on his federal tax returns, but a non-resident City employee may deduct only a percentage of his Section 1127 payment as a business expense. As a result, non-resident City employees must pay more federal taxes than their resident

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[8] Both parties misclassify the issue by focusing on whether Section 1127 imposes a tax or mandates particular contractual agreements. The Privileges and Immunities Clause has been applied to discriminatory taxes as well as to contracts governing employment. *See Lunding et ux. v. New York Tax Appeals Tribunal et. al.*, 522 U.S. 287 (1998) (tax); *Camden*, 465 U.S. 208 (1984) (employment contracts). This disagreement between the parties therefore is irrelevant.

counterparts because their taxable income places them in a higher tax bracket.

But again, this does not amount to a legitimate basis for challenging Defendants' law under the Privileges and Immunities claim because, as with his claim under the False Claims Act, this injury stems from the federal tax code, not from the City Charter. Neither the City nor its agents can be held legally responsible for the federal government's decision to permit certain income deductions but not others. Even if the Privileges and Immunities Clause protects a right to equal pay – and the Court does not speak to that issue here – the *City* cannot be violating that right under the Privileges and Immunities Clause.

Eisenstein may also be suggesting that his right to employment has been burdened. While "the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause, *United Bldg. & Constr. Trades Council v. City of Camden,* 465 U.S. 208, 219 (1984) (*citing Baldwin v. Montana Fish & Game Comm'n,* 436 U.S. 371, 387 (1978)), [p]ublic employment . . . is qualitatively different from employment in the private sector." *United Bldg.,* 465 U.S. at 219. Privileges that are not fundamental include the privilege of public employment. *Lai v. New York City Gov't,* 991 F. Supp. 362, 365 (S.D.N.Y. 1998) (*citing United Bldg.,* 465 U.S. at 219)).

Accordingly, Eisenstein cannot establish that Defendants are violating a fundamental right protected by the Privileges and Immunities Clause. Defendants' Motion to Dismiss Eisenstein's Privileges and Immunities claim is hereby GRANTED.

C. Count Three: Commerce Clause

Eisenstein also challenges Section 1127 under the Commerce Clause. The Commerce Clause of the United States Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, Cl. 3. This express grant to Congress contains "a further, negative command, known as the dormant Commerce Clause," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S. Ct. 1331 (1995), that "'create[s] an area of trade free from interference by the States.'" *American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2422-23 (2005) (*quoting Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S. Ct. 599 (1977)).

Analysis of a local statute under the dormant Commerce Clause is a two-part inquiry. "Under the first step, we determine whether the challenged law 'regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.'" *Gary D. Peake Excavating, Inc. v. Town of Hancock*, 93 F.3d 68, 73-74 (2d Cir. 1996) (*quoting Oregon Waste Sys. v. Dept. of Envtl.*

Quality, 511 U.S. 93, 114 S. Ct. 1345, 1349 (1994). 'Discrimination' "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Gary D. Peake,* 93 F.3d at 74 (*quoting Oregon Waste,* 511 U.S. 93, 114 S. Ct. at 1350-51). Courts generally ask whether the statute was especially "*designed* to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 192 (1994) (emphasis added). *See also New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-74 (1988) ("The 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."); *Bacchus Imports Ltd. v. Dias,* 468 U.S. 263, 270-73 (1984).

The second step of inquiry under the dormant Commerce Clause applies the appropriate level of scrutiny to the challenged law. If the law "discriminates" against interstate commerce, "the strictest scrutiny" is applied. *Gary D. Peake,* 93 F.3d at 74 (*quoting Oregon Waste,* 511 U.S. 93, 114 S. Ct. at 1350-51). But if the law does not discriminate against interstate commerce, a more flexible balancing test is to be used. *Gary D. Peake,* 93 F.3d at 74. In such cases, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the

putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

As to the first step, Section 1127 does not discriminate against interstate commerce. While true that "transportation of persons across state lines . . . has long been recognized as a form of 'commerce,'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997) (*citing Edwards v. California*, 314 U.S. 160, 172 (1941)), nothing on the record indicates how Section 1127 actually *discriminates* against transportation of persons, or against interstate commerce generally. Moreover, Eisenstein does not allege that the statute was specifically designed to benefit in-state economic interests by burdening out-of-state competitors.

Therefore, Section 1127 shall be analyzed under the flexible balancing test prescribed in *Pike*.[9] Under

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[9] That Section 1127 may treat in-state residents who live outside the City in the same fashion that it treats out-of-state residents would not insulate Defendants from liability. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392-94 (1994) (local ordinance requiring that solid waste processed or handled within town be processed or handled at town's transfer station was discriminatory under the Dormant Commerce Clause); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan*, 504 U.S. 353, 361 (1992) (state may not avoid strictures of the commerce clause by imposing waste import restrictions on inter-county transactions, whether or not those transactions traverse state lines); *Dean Milk Co. V. Madison*, 340 U.S. 349, 354 (striking down a city ordinance that required all milk sold in the city to be pasteurized within five miles of the city lines because it was "immaterial that Wisconsin milk from outside the

(Continued on following page)

Pike, the Court must ask whether "the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits.").

As a matter of law, the burden imposed on interstate commerce by Section 1127 is not clearly excessive in relation to the putative local benefits. Section 1127 does not require payments from all commuters; rather, it only imposes such a requirement on municipal employees who commute from outside the City. The right of a municipality to limit its hiring to City residents cannot seriously be doubted. *See McCarthy v. Philadelphia Civil Service Comm'n,* 424 U.S. 645, 647 (1976) (municipal regulation requiring employees of the City of Philadelphia to be residents of the city did not violate the Fourteenth Amendment); *Lorenz v. Logue,* 611 F.2d 421, 422-23 (2d Cir. 1979) (residential requirement for municipal employees in New Haven did not run afoul of the constitutional right to travel).[10] Section 1127 is far less restrictive on interstate commerce than such absolute residency requirements.[11]

Madison area is subjected to the same proscription as that moving in interstate commerce").

[10] In fact, the State of New York requires all municipal officers to be residents of the municipality where they work. N.Y. Pub. Off. Law § 3(1). Sanitation workers, firefighters, and police and correction officers are exceptions to this statewide requirement. N.Y. Pub. Off. Law §§ 3(2), (2-a) & 3(9).

[11] In *City of New York v. New York,* the New York Court of Appeals held that a commuter tax on all out-of-state residents who worked in New York City ran afoul of the dormant

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The Supreme Court has observed that "[t]he limitation imposed by the [dormant] Commerce Clause on state regulatory power is by no means absolute, and the States retain authority under the general police powers to regulate matters of legitimate local concern, even though the interstate commerce may be affected." *Maine v. Taylor,* 477 U.S. 131, 138 (1986) (internal quotations omitted). A city's wanting its employees to be politically, socially, and fiscally invested in the city's well-being is a legitimate local interest – one that is not founded in bare economic protectionism.[12]

Commerce Clause. 94 N.Y.S.2d 122, 132-33 (2000). Even were that decision binding on this Court, it would not prove dispositive to this case because Eisenstein's claim differs from *City of New York* in an important respect: Section 1127 imposes a financial requirement only on municipal employees.

[12] In an Appendix to his Complaint, Eisenstein alleges that "the intent of the statute [sic] was to discourage employees from moving out of the City of New York." (Compl., App. A at 36.) Even were the Court to find that Section 1127 was designed to discriminate against interstate commerce and therefore subject to an elevated level of scrutiny, the provision would pass constitutional muster. That a municipality may impose an absolute residency requirement on its employees is well-settled. *See, e.g., McCarthy,* 424 U.S. at 647; *Lorenz,* 611 F.2d at 422-23. A less restrictive burden, such as Section 1127, which by no counts appears to have economic protectionism as its purpose cannot violate the dormant Commerce Clause. *See Chemical Waste Mgt., Inc. v. Hunt,* 504 U.S. 334, 344 (1992) (internal quotations omitted) (if a local law is found to discriminate against interstate commerce, it must be "demonstrably justified by a valid factor unrelated to economic protectionism.' ").

Accordingly, the City's Motion to Dismiss Eisenstein's Commerce Clause claim is hereby GRANTED.

D. Count Four: NY Labor Law § 220

Eisenstein's Fourth Cause of Action is under what he labels "New York State Labor Law." (Compl. at 16.) The Court assumes that he is referring to Section 220 of the New York State Labor Law ("Section 220") since he refers to it elsewhere in the Complaint. (*See* Compl. at 10.) Section 220 regulates employment contracts in which the state, a public benefit corporation, or a municipal corporation or commission is a party. *Id.*

The only part of Section 220 perhaps pertinent to Eisenstein's claim is the provision stating that "the wages to be paid for a legal day's work . . . to laborers, workmen, or mechanics upon such public works, shall not be less than the prevailing rate of wages as hereinafter defined." N.Y Labor Law § 220(3). Section 220 defines "prevailing rate of wages" as:

> the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed.

N.Y. Labor Law 220(3).

Eisenstein appears to claim that the amount paid to the City pursuant to Section 1127 reduces the wages of non-resident City employees and, in so doing, creates a tiered wage structure in which non-residents' rate of compensation is less than the prevailing rate of wages.

But the Court agrees with Defendants that Eisenstein does not allege facts to make out a cause of action under Section 220 of the New York Labor Code. The Complaint does not allege, as Section 220 requires, that wages paid were not in accordance with the prevailing rate of wages, nor does the Complaint allege any prevailing rate of wages in the first instance. Mere vague, conclusory allegations cannot withstand a motion to dismiss. *Boddie v. Schnieder,* 105 F .3d 857, 862 (2d Cir. 1997); *Furlong v. Long Island College Hosp.,* 710 F.2d 922, 927 (2d Cir. 1983) (conclusory statements cannot substitute for "minimally sufficient factual allegations").

The leeway granted to *pro se* parties cannot fortify Eisenstein's Complaint. When there are no relevant facts alleged, as here, even a *pro se* plaintiff's complaint cannot withstand scrutiny under a Motion to Dismiss.

Accordingly, Defendants' Motion to Dismiss Eisenstein's Section 220 claim is hereby GRANTED.

IV. LEAVE TO AMEND WOULD BE FUTILE

Even when a complaint has been dismissed, permission to amend it "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "While it is the usual practice upon granting a motion to dismiss to allow leave to replead," *Cohen v. Citibank,* No. 95 Civ 4826, 1997 WL 883789, at *2 (S.D.N.Y. Feb. 28, 1997), a court may dismiss without leave to amend when amendment would be futile. *Oneida Indian Nation of New York v. City of Sherrill,* 337 F.3d 139, 168 (2d Cir. 2003) (citing *Forman v. Davis,* 371 U.S. 178, 182 (1962)).

In light of Section 1127's appearing in public records, Plaintiff cannot allege that Defendants made a false or fictitious representation via that law, and therefore cannot allege in an amended pleading that Defendants violated the False Claims Act. Neither can Plaintiff allege in an amended pleading a violation under the United States Constitution, because the constitutional right of a municipality to hire only city residents cannot seriously be doubted. Finally, Plaintiff would not be able to allege a violation of Section 220 of the New York Labor Code because there are no indications that Section 1127 requires non-resident City employees' salaries, but not resident City employees' salaries, to fall below the prevailing rate of wages. For these reasons, amendment of Plaintiff's Complaint would be futile, and Plaintiff shall not be granted leave to amend his Complaint.

V. *PRO SE* REPRESENTATION

Although plaintiffs have a right to proceed *pro se* in civil actions pursuant to 28 U.S.C. § 1654 ("[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel. . . ."), a *pro se* plaintiff may not seek to represent the interests of third parties. *Iannaccone v. Law,* 142 F.3d 553, 558 (2d Cir. 1998) (preventing *pro se* plaintiff from representing interests of decedent's estate); *Shapiro, Bernstein & Co. v. Continental Record Co.,* 386 F.2d 426, 427 (2d Cir. 1967) (per curiam) (preventing *pro se* plaintiff from representing interests of corporation); *Phillips v. Tobin,* 548 F.2d 408, 411-12 (2d Cir. 1976) (preventing *pro se* plaintiff from bringing shareholder derivative suit); *Eagle Assocs. v. Bank of Montreal,* 926 F.2d 1305, 1310 (2d Cir. 1991) (preventing layperson from representing a partnership); *Cheung v. Youth Orchestra Found, of Buffalo, Inc.,* 906 F.2d 59, 61 (2d Cir. 1990) (preventing parent from appearing *pro se* on behalf of her minor child).

Eisenstein's Complaint names four additional non-resident plaintiffs (Barbara Daly, Priscilla Aitkin, Ellen Koop, Joanna Augugliaro). (Compl. at 3-4.) Raymond Jacobs also has filed a letter with the Court seeking to join as an additional plaintiff. (Notice of Additional Plaintiff, Oct. 11, 2003.) These individuals cannot be represented by Eisenstein as a

non-lawyer.[13] Accordingly, the Court considers the allegations in the Complaint only as they relate to Eisenstein. The claims of all other named individuals are hereby DISMISSED WITHOUT PREJUDICE.

VI. DOE DEFENDANTS

Eisenstein additionally has named John Doe and Jane Doe as Defendants in this action. Plaintiff has made no indication of their identities. Accordingly, the claims as they relate to the Does are hereby DISMISSED WITH PREJUDICE.

VII. CONCLUSION

Defendants' Motion to Dismiss Eisenstein's causes of action under the False Claims Act, the Privileges and Immunities Clause, the Commerce Clause, and Section 220 of the New York Labor Code is GRANTED.

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[13] The Second Circuit has suggested in dicta that a *pro se* complainant may not be able to bring a *qui tam* action under the False Claims Act. *Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2d Cir. 1978). However, even were this Court to find that Eisenstein cannot bring a claim under the FCA as a relator because he is acting *pro se*, "the remedy would not be outright dismissal but a direction that the action be dismissed unless an attorney is retained." *Id.* In this case, absolutely no grounds corroborate Plaintiff's claim that the City's public tax code constitutes a fraudulent representation to the federal government, *see* Section III.A, *supra*, and therefore permitting Plaintiff to retain an attorney would be futile.

SO ORDERED

Dated: New York, New York
March 30, 2006

/s/ Deborah A. Batts
Deborah A. Batts
United States District Judge

OPPOSITION BRIEF

114 (2)

No. 08-660

Supreme Court, U.S.
FILED
DEC 9 - 2008
OFFICE OF THE CLERK

In the

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,
Petitioner,

v.

CITY OF NEW YORK, MICHAEL BLOOMBERG,
JOHN DOE, JAND DOE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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December 9, 2008

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STATEMENT OF THE CASE

The United States District Court for the Southern District of New York dismissed petitioner's complaint for failure to state a claim upon which relief can be granted. The complaint purported to allege four claims, only one of which was made under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (the "FCA"). Petitioner filed his notice of appeal fifty-four days after entry of the District Court's judgment.

The Second Circuit dismissed petitioner's appeal for lack of jurisdiction. The Court held that in an FCA action in which the government has declined to intervene, the government is not a party for purposes of Fed. R. App. P. 4(a)(1). Therefore, the Court held, petitioner had thirty days to file his notice of appeal. Because he filed his notice of appeal more than thirty days after entry of judgment, the appellate court held that it lacked jurisdiction to hear the appeal.

BACKGROUND

Petitioner Irwin Eisenstein commenced this action *pro se*, alleging four separate claims, including a single claim under the FCA. As required by 31 U.S.C. § 3730(b)(2), petitioner filed his complaint with the United States District Court for the Southern District of New York *in camera* and served it upon the United States Government.

31 U.S.C. § 3730(b)(2) allows the Government sixty days to elect to intervene in the action. The Government, pursuant to 31 U.S.C. § 3730(b)(4)(B), timely notified the District Court that it declined to intervene in the action. The Government's notice indicates that copies were sent to each of the plaintiffs named in the complaint. Thereafter, petitioner exercised his right to conduct the action pursuant to 31 U.S.C. § 3730(c)(3).

The District Court entered an Order unsealing the complaint and authorizing its service upon Respondents. The District Court also directed the plaintiffs to serve a copy of the United States' Notice of Election to Decline Intervention upon Respondents. Thereafter, petitioner served a copy of the complaint upon Respondents.

The District Court dismissed the complaint for failure to state any claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). Fifty-four days after entry of judgment, petitioner filed a notice of appeal.

The United States Court of Appeals for the Second Circuit, in a *sua sponte* Order dated December 26, 2006, directed the parties and the United States to brief the question whether petitioner timely filed his notice of appeal. (Appendix 4a-5a)[1] Specifically, the Circuit Court

[1] References to "Appendix" followed by a page number refer to Petitioner's Appendix annexed to his petition.

requested briefing on whether the thirty day time limit in Fed. R. App. P. 4(a)(1)(A) (28 U.S.C. § 2107(a)) for filing a notice of appeal, or the sixty day time limit in Rule 4(a)(1)(B) (28 U.S.C. § 2107(b)), applicable where the United States Government is a party, applies in an action under the FCA where the United States has declined to intervene.

The Court noted that the Circuits were split on the question whether the thirty day or the sixty day limit applied in an FCA action where the United States declines to intervene in the proceedings: the Fifth, Seventh and Ninth Circuits had held that the sixty day limit applies, while the Tenth Circuit had applied the thirty day time limit. *See United States ex rel. Lu v. Ou*, 368 F.3d 773 (7th Cir. 2004) (applying the sixty day limit); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999)(same); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996), *cert. denied,* 520 U.S. 1211 (1997)(same); *compare United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1978), *cert. denied*, 444 U.S. 839 (1979)(applying the thirty day limit).

Respondents submitted their Brief advocating the thirty day limit. Respondents based their motion on the additional ground that a non-attorney litigant may not prosecute an FCA action

pro se.[2] The United States submitted a Brief as *amicus curiae* which also advocated the 30-day time limit. The Circuit Court appointed *pro bono* counsel to represent petitioner solely for the purpose of briefing the two issues raised by the motion.

Petitioner *pro se* and Respondent also submitted briefs on the merits of the appeal. At no time did the United States move to intervene, nor did the United States submit any papers other than the Brief requested by the Circuit Court and the Government's Notice of Election to Decline Intervention. (Appendix 5a)

The Order of the Circuit Court of Appeals

In a unanimous opinion issued on August 19, 2008 (Appendix 1a), the Second Circuit dismissed the appeal as untimely. *United States ex rel. Irwin Eisenstein v. City of New York*, 540 F.3d 94 (2nd Cir. 2008). The Court held that, in an action under the FCA in which the United States has declined to intervene, the United States is not a party for purposes of Fed. R. App. P. 4(a)(1), and therefore

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[2] The Court did not reach this issue. In the event that this Court were to reverse the Second Circuit on the issue raised here by petitioner, the Second Circuit would likely affirm the District Court's dismissal on the separate ground that a non-attorney litigant may not prosecute an FCA action *pro se*. (Appendix 3a n.1) *See United States ex rel. Mergent Services v. Flaherty*, 540 F.3d 89 (2d Cir. 2008).

the thirty day time limit for filing a notice of appeal applies.

The Court held that "[a]s used in Rule 4(a)(1), the word 'party' refers to the person participating in the proceedings with control over litigation." (Appendix 8a) Therefore, the Court concluded, the government's status as the real party in interest in an FCA suit did not make the government a "party" where the government has declined to intervene and played no role in the court proceedings.

The Court wrote that the term "real party in interest" "is a term of art used in the rules of procedure," referring to Fed. R. Civ. P. 17(a)(1), which requires that actions be brought in the name of the "real party in interest". (Appendix 10a) The Court concluded that "[w]e therefore regard the omission of 'real party in interest' from [Federal Rule of Appellate Procedure] Rule [4](a)(1)(B) as meaningful." *Id.*

Indeed, where the government has not intervened in an FCA suit, the relator has the exclusive right to conduct the action. 31 U.S.C. §§ 3730(b)(4)(B), (b)(5) and (c)(3). The government may subsequently intervene only upon a showing of good cause. 31 U.S.C. § 3730(c)(3). As the Second Circuit wrote, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Appendix 8a)

The Court also noted that the intent underlying Rule 4(a)(1)(B) is to account for the "slow machinery of government." (Appendix 10a) The Court held that "this rationale is obviously inapplicable to the present case, where the government has played no part in the underlying litigation other than to decline to participate in it." (Appendix 11a)

The Court agreed with the Tenth Circuit that the naming of the government as a plaintiff "was merely a statutory formality," citing *Van Cott*, 588 F.2d at 1329. (Appendix 15a). The Court held that where, as here, all active parties are aware that the government had declined to intervene, there is no need to allow more than the standard thirty days to make an appeal. (*Id.*)

The Second Circuit declined to follow the analysis employed by the Fifth, Seventh and Ninth Circuits, which hold that a "literal" interpretation of Rule 4(a) compels the conclusion that the government is a party, and that such an interpretation is required because it provides litigants with the ability "to figure out which time period applies, easily, without extensive research, and without uncertainty." *Hughes Aircraft Co., supra,* 98 F.3d at 1102. (Appendix 13a) As set forth above, the Court held that the use of the term "real party in interest" in Fed. R. Civ. P. 17 is

intended to be distinct from the word "party" in Rule 4(a)(1).

Finally, the Court noted that "counsel of minimal competence will take pause upon reading Rule 4(a) to consider whether the United States was actually a 'party' to the action" and that, if there were any doubt, "any reasonable counsel would allay these concerns by sensibly filing a notice of appeal within 30 days."[3] (Appendix 14a) Significantly, the Court observed that "there is little history of confusion, and, even with this decision, the issue has not arisen in the majority of circuits despite the many decades in which the provisions of Rule 4(a)(1)(B) and False Claims Act *qui tam* actions have coexisted." (*Id.*)

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[3] Every Circuit Court which has considered the issue has held that a non-attorney litigant may not bring an action under the False Claims Act without appearing by a duly admitted attorney. *See, e.g.*, *United States ex rel. Mergent Services v. Flaherty*, *supra*, 540 F.3d 89 (2d Cir. 2008); *Timson v. Sampson*, 518 F.3d 870 (11th Cir.), *cert. denied*, 129 S. Ct. 74 (2008); *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1728 (2008); *United States ex rel. Lu v. Ou*, *supra*, 368 F.3d 773 (7th Cir. 2004); *United States v. Onan*, 190 F.2d 1 (8th Cir.), *cert. denied*, 342 U.S. 869 (1951).

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT CORRECTLY HELD THAT, WHERE THE GOVERNMENT HAS NOT INTERVENED IN AN ACTION UNDER THE FALSE CLAIMS ACT, THE GOVERNMENT IS NOT A PARTY FOR PURPOSES OF FED. R. APP. P. 4(a)(1) BECAUSE THE UNITED STATES MAY NEITHER PARTICIPATE IN THE PROCEEDINGS NOR CONTROL THE LITIGATION AND BECAUSE INTERVENTION WOULD NOT BE NECESSARY IF THE UNITED STATES WERE A PARTY.

All of the Courts which have addressed the issue have recognized that the sixty day rule applies where the government is a "party." Furthermore, it is undisputed here that the government is the real party in interest in an FCA suit. Where the parties and the Courts differ is whether a "real party in interest" is the same as a "party" for purposes of Fed. R. App. P. 4(a)(1). A proper interpretation of the rule compels the conclusion reached here by the Second Circuit: the government is not a party for purposes of the time limit within which an appeal must be filed.

This Court has not specifically addressed whether the United States is a party to an action under the False Claims Act for purposes of

determining whether the thirty day or the sixty day rule of Fed. R. App. P. 4(a)(1) applies. However, this Court's holding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), addresses a related question, albeit in a different context. There is no need to revisit the issue here.

In *Stevens,* this Court was presented with the question "whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ 3729-3733." 529 U.S. at 768. But, before the Court could reach the main question, it first addressed whether the private individual had standing under U.S. Const. Article III to maintain the action at all where the government had declined to intervene. The Court answered this threshold question in the affirmative, finding that the private individual was a partial assignee of the government's claim.

The Court held:

> We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's

> damages claim. [footnote omitted] Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits . . . – and also suits by subrogees, who have been described as "equitable assignees." . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

529 U.S. at 773-774 (citations omitted)

The decision in *Stevens* distinguishes between a "party" (who must have Art. III standing to maintain a suit) and a "real party in interest," such as the government, who may not even have appeared in the action. Had the government been a party plaintiff to the litigation in *Stevens*, then there would clearly have been standing because the alleged injury in fact was indisputably sustained by the government. 529 U.S. at 774 ("We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.").

Indeed, in *Stevens*, this Court noted that "'the Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party.*'" 529 U.S. at 771-772 (citations omitted) (emphasis in original). Where, as here, the government has not intervened and taken

control of the suit, the only "party" in the action must be the relator. Because the government is not a party, then a litigant has thirty, not sixty, days to file a notice of appeal.

This Court's holding in *Stevens* undermines one of the rationales of the Seventh Circuit's holding in *Ou*. In *Ou*, as the Second Circuit noted, "the Seventh Circuit appears to have concluded that the United States must be a party to FCA actions because relators by themselves lack standing to sue. *Ou*, 368 F.3d at 775." (Appendix 14a) *Stevens* holds that relators do have standing to sue.

The Ninth Circuit's reliance on cases brought under the Miller Act is misplaced. The government is a real party, not just a party in interest, under the Miller Act. *United States Fidelity and* Guaranty *Co. v. United States for the Benefit of Kenyon*, 204 U.S. 349, 359 (1907)(United States is real litigant, not a mere nominal party, in cases under the statutory predecessor to the Miller Act).

Furthermore, the Fifth, Seventh and Ninth Circuits incorrectly equated the government's status as the real party in interest in a False Claims Act action to status as a party for purposes of the Federal Rules of Appellate Procedure — even where the government has not intervened. However, those Courts did not have the benefit of this Court's holding in *Stevens*. The standing analysis employed by this Court and the conclusion

reached in *Stevens* answer the question presented by petitioner here, and there is no need for the Court to revisit the issue.

Significantly, the Fifth Circuit has also held that the government has no right to appeal where it had not intervened in an FCA action. *Searcy v. Phillips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997). In *Searcy*, the Court wrote:

> In short, the [FCA's] structure distinguishes between cases in which the United States is an active participant and cases in which the United States is a passive beneficiary of the relator's efforts. When the government chooses to remain passive, as it has here, we see no reason to treat it as a party with standing to challenge the district court's action as of right.

117 F.3d at 156.

The Fifth Circuit sought to distinguish its holding in *Searcy* from the Ninth Circuit's decision in *Hughes Aircraft* (holding that the government is a party for purposes of Fed. R. App. P. 4(a)(1)) by writing that "viewing the government as a party for the purposes of Rule 4(a)(1) does not compel us to treat it as a party for all appellate purposes." 117 F.3d at 156. *Searcy* cannot reasonably be

reconciled with the Fifth Circuit's later decision in *Epic Healthcare, supra,* 193 F.3d 304.

In *Epic Healthcare,* the Court held that the government *is* a party for purposes of Fed. R. App. P. 4(a)(1), even though, according to *Searcy*, the government has no right to appeal from a judgment in an FCA action in which it has not intervened. The Fifth Circuit did not disavow its prior holding in *Searcy*; instead, the Court merely repeated its language from *Searcy* that it was not required to treat the government as a party for all appellate purposes. 193 F.3d at 307 n.1. The Court did not explain why the government might need sixty days to decide whether to appeal where, according to the Fifth Circuit, the government had no right to appeal in the first instance.[4]

Furthermore, the rationale of the Fifth Circuit's holding in *Epic Healthcare* and the Ninth Circuit's holding in *Hughes Aircraft* is suspect. Under the guise of a "literal" interpretation, both of those Courts held that the sixty day rule of Fed. R. App. P. 4(a)(1)(B) applies in FCA cases where the government has declined to intervene in order to avoid misleading an unwitting litigant. While the intent of those Courts is admirable, it is not a sound basis upon which to interpret a rule.

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[4] The *Epic Healthcare* Court expressly declined to "join the debate over a relator's standing under Article III," 193 F.3d at 307, a debate which this Court resolved in *Stevens*.

The Second Circuit held that the inclusion of the term of art "real party in interest" in Fed. R. Civ. P. 17(a)(1) and its omission from Fed. R. App. P. 4(a)(1)(B) was deliberate and "meaningful." (Appendix 10a) Thus, a proper interpretation of the Rules, which construes the Rules of Civil Procedure and the Rules of Appellate Procedure *in pari materia*, compels the conclusion that the government, although a real party in interest in a False Claims Act action, is not a "party" for purposes of the deadline for filing a notice of appeal.

Petitioner argues that the Second Circuit's analysis fails to address situations where the government had once been a party to an action, but was subsequently removed, and one of the remaining parties appeals. In fact, the Second Circuit did address that very situation. Referring to its decision in *United States v. American Society of Composers, Authors & Publishers*, 331 F.2d 117 (2d Cir. 1964) the Second Circuit wrote,

> what is of import is neither that Eisenstein brought a False Claims Act claim in the name of the United States, nor that the United States may be entitled to a portion of the recovery if Eisenstein prevails; what is of import is that the United States

> played no role in this matter before the district court.

(Appendix 13a) In *American Society of Composers*, the Court noted here, the sixty day limit was applied because the United States actively participated in the litigation. Appendix 11a. In this case, where the government has declined to intervene, the plain language of the FCA excludes the government from an active role in the proceedings unless the government later moves to intervene "upon a showing of good cause." 31 U.S.C. § 3730(c)(3). As the Second Circuit noted, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Appendix 8a)

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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December 9, 2008

REPLY BRIEF

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(3)

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

THE GOVERNMENT IS A "PARTY" UNDER RULE 4(a)(1)(B) EVEN WHERE IT DECLINES TO INTERVENE

1. In framing the issue here as "whether a 'real party in interest' is the same as a 'party'" under Rule[1] 4(a)(1)(B) (Opp. at 8), Respondents demonstrate a fundamental misunderstanding of this dispute. The question is not whether the phrase "real party in interest" is co-extensive with the word "party" under Rule 4(a)(1). Rather, the question is what condition(s) – independent of being a "real party in interest" – must be satisfied in order for a "real party in interest" to be or become a "party" under that rule.

Like Respondents, Petitioner seeks the answer in Rule 17(a)(1) of the Federal Rules of Civil Procedure ("Rule 17(a)(1)"). But the answer found there by Petitioner is diametrically opposed to that found by Respondents (*see* Opp. at 14). In Petitioner's reading of Rule 17(a)(1), the real party in interest is (or becomes) a party when the action is prosecuted "in the name of" the real party in interest. *See id.* ("An action must be prosecuted *in the name of* the real

---

[1] All short forms and abbreviations defined in Petitioner's Petition for Writ of Certiorari are incorporated herein by reference. "Opp." hereinafter refers to Respondents' Brief in Opposition. "Pet." hereinafter refers to Petitioner's Petition for Writ of Certiorari.

party in interest." (emphasis added)).[2] This condition for party status – suit in the real party in interest's "name" – is adverted to throughout Rule 17(a). *See, e.g.*, Fed. R. Civ. P. 17(a)(1) ("The following may sue *in their own names* without joining the person for whose benefit the action is brought. . . ." (emphasis added)); *id.* at 17(a)(2) ("Action *in the Name of* the United States for Another's Use or Benefit" (emphasis added)).[3] The purpose of the naming requirement is to bind the real party in interest to any judgment entered and thus to protect the defendant against later suit by the real party in interest. *See, e.g., Gogolin & Stelter v. Karn's Auto Imports, Inc.* 886 F.2d 100, 102 (5th Cir. 1989); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1039 (9th Cir. 1986).

Tellingly, the FCA uses *precisely* the same language – suit in the real party in interest's "name" – as does Rule 17(a)(1). Referring to a *qui tam* action, the FCA states: "The action shall be brought *in the name of* the Government." 31 U.S.C. § 3730(b)(1) (emphasis added). Moreover, nothing in the FCA remotely suggests that, after the Government declines to intervene, the *qui tam* action is no longer in the name of the Government. *See id.* §§ 3730(b)(4)(B),

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[2] Indeed, under Fed. R. Civ. P. 10(a), it is by being *named* in the title of the complaint that one becomes a "party": "Every pleading must have a caption with . . . a title. . . . The title of the complaint must *name* all parties. . . ." Fed. R. Civ. P. 10(a) (emphasis added).

[3] It is undisputed that the Government is, at a minimum, a real party in interest here. (Opp. at 8.)

3730(c)(3), 3730(d)(2) & (4). Rather, as here, the action continues to be in the "name" of the Government. *See id.* This continuity, consistent with the purpose of the naming requirement under Rule 17(a)(1), ensures that the Government is bound by any judgment and that the defendant is protected from later suit by the Government alone. (*See* Pet. App. at 8a (Government is "bound by the relator's actions for purposes of *res judicata* and collateral estoppel").)

Accordingly, the identity of language in Rule 17(a)(1) and 31 U.S.C. § 3730(b)(1) demonstrates that Congress has already resolved the issue here. Because a *qui tam* action is statutorily mandated to be in the "name" of the Government regardless of whether the Government intervenes or not, the Government in a *qui tam* action is actually a party and not simply a real party in interest.

Selective reading leads Respondents to find the wrong answer in Rule 17(a)(1). Respondents ignore the significance of Rule 17(a)(1)'s requirement of suing in the "name" of the real party in interest and therefore fail to conclude that such naming turns a "real party in interest" into a "party." Instead, Respondents rely on a misguided *expressio unius* argument – that the inclusion of the phrase "real party in interest" in Rule 17(a)(1) but *not* in Rule 4(a)(1)(B) (which instead uses "party") means that a mere "real party in interest" is *not* a "party" for purposes of Rule 4(a)(1)(B). (*See* Opp. at 14 (citing Pet. App. at 10a).) That is correct as far as it goes. But it does not go far

enough because it takes no account of Rule 17(a)(1)'s naming requirement. That naming requirement determines when a real party in interest is and is not a party.

2. Nothing in Respondents' Opposition undercuts Petitioner's contention that the Second Circuit's holding is unsupported by statute or rule, and is administratively unworkable. (*See* Pet. at 9, 12.) Under the Second Circuit's holding, a real party in interest is or becomes a party when it is "the person participating in the proceedings with control over litigation." (Pet. App. at 8a.) Notably, the Second Circuit cited no authority whatsoever for this proposition. (*See id.*) Instead, observing that the Government post-declination may not participate in the *qui tam* action without moving to intervene, the Court relied on the seemingly self-evident proposition that "[t]he inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (*Id.*) Echoing this view, Respondents contend that "intervention would not be necessary if the United States were a party." (Opp. at 8, 15.)

Both the Second Circuit and Respondents, however, incorrectly assume that the Government's intervention in a *qui tam* action post-declination, *see* 31 U.S.C. § 3730(c)(3), is the same as intervention under Rule 24 of the Federal Rules of Civil Procedure. Manifestly, it is not. Indeed, even where the Government post-declination does not move to intervene, any favorable judgment will *on its face* entitle

the Government to damages (or penalties), and the action may not be settled without Government approval, *see* 31 U.S.C. § 3730(b)(1). The Government will also be bound by the judgment. (*See* Pet. App. at 8a.) By contrast, in an ordinary action subject to Rule 24 intervention, a person or entity that does not move to intervene is a stranger to the action, and any judgment will not on its face entitle that person or entity to any award at all. Nor, as a general matter, will the non-intervenor be bound by the judgment. Thus, *qui tam* intervention, which is significantly different from Rule 24 intervention, cannot be a basis for defining when a real party in interest is or is not a party.

For these reasons, any rule purporting to make such a definition cannot workably depend on a concept as imprecise as "participation." Post-declination, the Government still may veto a settlement, be served with all pleadings (*see* 31 U.S.C. § 3730(c)(3)), obtain an express award on the face of a judgment, and be bound by any judgment. By any reasonable definition, these factors evidence "participation" in and "control over" litigation. (*See* Pet. App. at 8a.) While Respondents may well venture counter-arguments citing the ability to control discovery, these simply demonstrate that the debate is not susceptible of clear resolution. The Second Circuit's hazy rule of "participation" is therefore ill-suited to the hard reality of filing deadlines.

3. Respondents' discussion of *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (*see* Opp. at 9-11), need not long detain this Court. *Stevens* addressed the issue of whether a relator has standing to bring suit on the Government's behalf. The instant case, however, raises no issue of standing. Moreover, contrary to Respondents' argument (*see* Opp. at 10), *Stevens* involved *no* discussion of the distinction between a "party" and a "real party in interest," or of whether the Government post-declination is a "party" for purposes of Rule 4(a)(1)(B). For these reasons, Respondents' contention that the holdings of the Fifth, Seventh, and Ninth Circuits on the instant issue predate *Stevens* is unavailing. (Opp. at 11-12.)[5]

4. In addressing the concern that the Second Circuit's holding will confuse relators, both the Second Circuit and Respondents assert that there is "little history of confusion." (Opp. at 7 (quoting Pet.

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[4] The *Stevens* Court did hold, however, that a relator is effectively a partial assignee of the Government's damages claim. 529 U.S. at 773. Since the assignment – effected by the FCA's *qui tam* mechanism, *id.* – is only partial, the Government retains a partial claim. Thus, it is still a real party in interest, as both the Second Circuit and Respondents acknowledge.

[5] Contrary to the Second Circuit's holding (Pet. App. at 14a) and Respondents' Opposition (Opp. at 11), the primary rationale supporting *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004), was unrelated to standing. Thus, *Stevens* hardly undermines the persuasive value of *Ou*.

App. at 14a).) Suffice it to say that the existing 3-2 circuit split itself evidences a "history of confusion."[6]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[6] Should this Court reverse the Second Circuit's decision, the Second Circuit, rather than affirming on the separate ground that a relator may not bring a *qui tam* action *pro se* (*see* Opp. at 4 n.2), may give the relator herein the opportunity to retain counsel for further proceedings. *See Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2d Cir. 1978).

JOINT APPENDIX

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The following documents have been omitted from the Joint Appendix. They are part of the Appendix to the Petition for Writ of Certiorari. The page numbers of the Appendix are provided for the convenience of the Court.

United States, ex rel. Irwin Eisenstein v. City of New York, et al., 540 F.3d 94 (2d Cir. 2008).....1a

United States ex rel. Irwin Eisenstein v. City of New York, et al., No. 03 Civ. 413, 2006 WL 846376 (S.D.N.Y. Mar. 31, 2006).....16a

U.S. District Court
United States District Court for the Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:03-cv-00413-DAB

Date Filed	#	Docket Text
01/17/2003		Magistrate Judge Frank E. Maas is so designated. (laq) (Entered: 01/21/2003)
01/17/2003		CASE SEALED. (laq) (Entered: 01/21/2003)
01/17/2003	1	ORDER, sealing this action . (signed by Judge Deborah A. Batts) (laq) (Entered: 03/05/2003)
01/17/2003	5	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636 (c). Originally filed under seal. (db) (Entered: 03/25/2003)
01/17/2003	5	DEMAND for jury trial by ABC. Originally filed under seal. (db) (Entered: 03/25/2003)
01/21/2003	2	SEALED DOCUMENT placed in vault. (js) (Entered: 01/22/2003)
01/30/2003	3	SEALED DOCUMENT placed in vault. (wv) (Entered: 01/30/2003)
03/24/2003	4	ORDER: the complaint shall be unsealed, and service upon dfts by relators is authorized , the Govt's Notice of Election to Decline Intervention shall be served by

		the pltffs-relators upon dfts only after service of the complaint. All other procedures involving service are as further set forth in said order , the seal shall be lifted as to all other matters occuring in this aciton [sic] after the date of this order . (signed by Judge Deborah A. Batts) (db) (Entered: 03/25/2003)
03/24/2003		Case unsealed. (db) (Entered: 03/25/2003)
03/24/2003	6	Memorandum to Docket Clerk:, Please indicate on the Courts docket that a summons was issued in the above captioned case on 3/24/03 . (ac) (Entered 03/26/2003)
03/24/2003	7	RETURN OF SERVICE of summons and complaint executed as to City of New York, Michael Bloomberg by personal service on 3/24/03 . Answer due on 4/14/03 for City of New York, for Michael Bloomberg . (sb) (Entered: 03/26/2003)
04/25/2003	8	Memo-Endorsement on letter addressed to Judge Batts from George P. Lynch, dated 4/3/03. Counsel for the City of NY requests that their time to respond to the complaint be extended until 5/28/03. Application granted . (signed by Judge Deborah A. Batts) (sb) (Entered: 04/25/2003)

05/27/2003	9	ORDER; informing the pltff of his responsibilities relating to this action. (signed by Judge Deborah A. Batts); (sac) (Entered: 05/30/2003)
05/29/2003	10	NOTICE OF MOTION by City of New York, Michael Bloomberg, John Doe, Jane Doe for an order purs. to Rule 12(b)(6) of the FRCP dismissing the complaint . Return Date 7/22/03 at 9:30. (sb) (Entered: 06/04/2003)
05/29/2003	11	MEMORANDUM OF LAW by City of New York, Michael Bloomberg, John Doe, Jane Doe in support of [10-1] motion for an order purs. to Rule 12(b)(6) of the FRCP dismissing the complaint . (sb) (Entered: 06/04/2003)
06/25/2003	12	Order that case be referred to the Clerk of Court for assignment to a Magistrate Judge for General Pretrial/Including Initial Case Management Conference. Referred to Magistrate Judge Frank Maas. (signed by Judge Deborah A. Batts) (tp) (Entered: 06/26/2003)
06/27/2003	13	NOTICE OF MOTION by Irwin Eisenstein for an order purs. to FRCP 56 for a summary judgment against the defendant , for an order granting class status under FRCP 23, and for an order for

		verification of the false claim . Return Date 7/22/03 at 9:30. (sb) (Entered: 07/09/2003)
07/08/2003	14	REPLY MEMORANDUM by City of New York, Michael Bloomberg in support re: [10-1] motion for an order purs. to Rule 12(b)(6) of the FRCP dismissing the complaint . (yv) (Entered: 07/09/2003)
08/11/2003	15	MEMORANDUM OF LAW by Irwin Eisenstein in support of [13-1] motion for an order purs. to FRCP 56 for a summary judgment against the defendant . (cd) (Entered: 08/20/2003)
10/15/2003	16	NOTICE of appearance by Raymond Jacobs, as an additional plntf (cd) (Entered: 10/21/2003)
12/09/2003		MEMORANDUM TO THE DOCKET CLERK: This referral was closed on 7/14/03, for Magistrate purposes at the direction of Judge Batts, as the motion to dismiss is being handled by the District Judge. (ae,) (Entered: 01/02/2004)
12/09/2003		Judge Frank Maas no longer assigned to case. (ae,) (Entered: 01/02/2004)
08/19/2004	17	NOTICE of Change of Address by Irwin Eisenstein. New Address: 9725 Sloop Place, Apt. 106,

		Orlando, FL., 32825. (sac,) (Entered: 08/24/2004)
03/30/2006	18	ORDER granting 10 Motion to Dismiss. (Signed by Judge Deborah A. Batts on 3/30/06) (dle,) (Entered: 03/30/2006)
03/31/2006	19	MEMORANDUM AND ORDER: aCCORDINGLY, The claims as they relate to the Does are hereby DISMISSED WITH PREJUDICE. Defendants' motion to dismiss Eisenstein's causes of action under the False Claims Act, the privileges and Immunities Clause, the commerce Clause, and section 220 of the New York Labor Code is GRANTED. (Signed by Judge Deborah A. Batts on 3/30/06) (js,) (Entered: 04/03/2006)
03/31/2006		Transmission to Judgments and Orders Clerk. Transmitted re: 19 Order,, to the Judgments and Orders Clerk. (rag,) (Entered: 04/03/2006)
04/12/2006	20	CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum and Order dated March 30, 2006, defendants? motion to dismiss is granted on all claims. (Signed by J. Michael McMahon, clerk on 4/12/06) (ml,) (Entered: 04/12/2006)

04/13/2006		Mailed notice of Right to Appeal re: 20 Clerk's Judgment and to Attorney(s) of Record: Eisenstein. (lma,) (Entered: 04/13/2006)
06/05/2006	21	NOTICE OF APPEAL from 20 Clerk's Judgment. Document filed by Irwin Eisenstein. Filing fee $ 455.00, receipt number E 583896. Copies of Notice of Appeal mailed to Attorney(s) of Record: Corporation Counsel. (tp,) (Entered: 07/13/2006)
07/13/2006		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 21 Notice of Appeal. (tp,) (Entered: 07/13/2006)
07/13/2006		Transmission of Notice of Appeal to the District Judge re: 21 Notice of Appeal. (tp,) (Entered: 07/13/2006)
07/14/2006	22	Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for 21 Notice of Appeal filed by Irwin Eisenstein, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp,) Additional attachment (s) added on 8/2/2006 (dt,). (Entered: 07/14/2006)

07/14/2006		Appeal Record Sent to USCA (File). Indexed record on Appeal Files for 21 Notice of Appeal filed by Irwin Eisenstein, were transmitted to the U.S. Court of Appeals on 7/14/06. (tp,) (Entered: 07/14/2006)
08/11/2006		USCA Case Number 06-3329-cv from the U.S.C.A. 2nd Circuit assigned to 21 Notice of Appeal filed by Irwin Eisenstein. (tp,) (Entered: 08/14/2006)
11/03/2008	23	RETRUNED [sic] HARD COPY TO U.S.C.A. 1/30/09 AS PER ORDER DOC. # 24) – MANDATE of USCA (Certified Copy) as to 21 Notice of Appeal filed by Irwin Eisenstein USCA Case Number 06-3329-cv. Ordered, Adjudged and Decreed that the motion to dismiss is GRANTED in accordance with the opinion of this court. Catherine O'Hagan Wolfe, Clerk USCA. Issued As Mandate: 10/31/2008. (nd) Modified on 1/30/2009 (dt). (Entered: 11/03/2008)
11/03/2008		Transmission of USCA Mandate/Order to the District Judge re: 23 USCA Mandate,. (nd) (Entered: 11/03/2008)
01/30/2009	24	ORDER of USCA (Certified Copy) as to 21 Notice of Appeal filed by Irwin Eisenstein USCA Case

Number 06-3329-cv. A mandate having issued on October 31, 2008 in the above captioned matter, and petition for a writ of certiorary [sic] having been filed in the United States Supreme Court on November 13, 2008, and the writ of certiorari having been granted on January 16, 2009. IT IS HEREBY ORDERED that the mandate in this case is recalled, restoring jurisdiction to this Court. Catherine O'Hagan Wolfe, Clerk USCA. Certified: 01/28/09. (dt) (Entered: 01/30/2009)

General Docket
US Court of Appeals for the Second Circuit

Court of Appeals Docket #: 06-3329-cv

United States v. City of New York

7/14/06	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Irwin Eisenstein, filed. [Entry date Jul 21 2006] [DH]
7/14/06	Copy of receipt re: payment of docketing fee filed on behalf of APPELLANT Irwin Eisenstein, . RECEIPT #E583896 [Entry date Jul 21 2006] [DH]
7/14/06	Copy of U.S. District Court Memorandum & Order dated March 30, 2006. [Entry date Jul 21 2006] [DH]
7/14/06	Copy of U.S. District Court judgment dated April 12, 2006. [Entry date Jul 21 2006] [DH]
7/14/06	Note RELATED case number(s): 05-2570-cv [Entry date Jul 21 2006] [DH]
7/14/06	Record on appeal filed. (Original papers of district court.) Volume(s) 1 [Entry date Jul 21 2006] [DH]
7/21/06	Instructional Forms sent to Pro Se litigant [Entry date Jul 21 2006] [DH]
7/26/06	Record on appeal received in records room from team.1 vol [Entry date Jul 26 2006] [NS]

7/28/06	Notice of appeal acknowledgment letter from Sheila Gowan, AUSA, received. [Entry date Aug 8 2006] [DH]
12/6/06	Sua sponte dismissal is on the substantive motions calendar for December 19, 2006**ON SUBMISSION**; any responsive papers to calendar ASAP. [Entry date Dec 6 2006] [JC]
12/21/06	Letter received from Irwin Einstein [sic] requesting to respond to motion and file a brief. [Entry date Dec 22 2006] [JC]
12/26/06	Order filed stating, Appellant seeks to appeal the district court's order dismissing his qui tam action brought on behalf of the United States. However, the Appellant filed his notice of appeal fifty-four days after the district court's entry of judgment. Upon due consideration, the parties and the United States are ORDERED to brief the issue of whether the thirty-day time limit for filing a notice of appeal, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), or the the [sic] sixty-day time limit for filing a notice of appeal, pursuant to Rule(a)(1)(B), which applies when the United States is a party, applies to a qui tam action where the United States decline to intervene in the proceedings. See United States ex rel. Russell v. Epic Healthcare Mgmt. Group, 193 F.3d 304, 308 (5th Cir. 1999) (holding that the sixty-day time

	limit applies); United States ex rel. Lu v. Ou, 368 F.3d 773, 775 (7th Cir. 2004) (same); United States ex rel. Haycock v. Hughes Aircraft Co., 98 F.3d 1100, 1102 (9th Cir. 1996) (same); but see United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy, 588 F.2d 1327, 1329 (10th Cir. 1978) (applying the thirty-day time limit). The briefs required by this order must be filed within thirty days of the entry date of this order. Before: Pooler, Sack, Wesley, CJJ. Endorsed for the Court by OMG. [Entry date Dec 26 2006] [DH]
12/26/06	Notice to counsel/pro se re: Order dated 12/26/06. [Entry date Dec 26 2006] [DH]
1/24/07	Papers <brief in compliance to Court Order dated 12/26/06> from APPELLANT Irwin Eisenstein, received. [Entry date Jan 26 2007] [DH]
1/25/07	Papers <Paper in compliance to Order dated 12/26/06> from APPELLANT Raymond Jacobs, received. [Entry date Jan 26 2007] [DH]
1/25/07	Appellee City of New York motion to dismiss the appeal filed with proof of service. [Entry date Jan 26 2007] [DH]
3/5/07	Order FILED REFERRING motion dismiss the appeal by Appellee City of New York, endorsed on motion dated 1/25/2007. IT IS HEREBY ORDERED that the motion to dismiss is referred to

	the panel that will decide the appeal: pro bono counsel shall be appointed for pro se Appellants only for purposes of the motion to dismiss to brief the two issues raised: (1) whether that 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) for filing a notice of appeal, or the 60-day time limit in Rule 4(a)(1)(B), applies to a qui tam action in which the United States declines to invervene: and (2) whether a litigant may bring a qui tam action pro se. Before Hon. RSP. RDS. RCW Endorsed by TWY Motions Staff Attorney [Entry date Mar 7 2007] [AS]
3/7/07	Notice to parties regarding court order dated 3/5/07 [Entry date Mar 7 2007] [AS]
4/2/07	Raymond Jacobs' Amicus memorandum of Law in opposition to motion dismiss the appeal, dismiss the appeal filed with proof of service [Entry date Apr 4 2007] [DH]
4/5/07	Appellant Irwin Eisenstein motion for an En Banc hearing or alternatively an interlocutory appeal, filed with proof of service. [Entry date Apr 11 2007] [DH]
4/18/07	Appellee's Reply Affidavit in further support of the motion dismiss the appeal, dismiss the appeal filed with proof of service. [Entry date Apr 19 2007] [DH]

4/30/07	Notice to counsel/pro se re: Order dated 4/30/07. [Entry date Apr 30 2007] [DH]
4/30/07	Order FILED REFERRING motion for an en banc hearing by Appellant Irwin Eisenstein, endorsed on motion dated 4/5/2007. IT IS HEREBY ORDERED that the motion to have an en banc hearing or an interlocutory appeal is referred to the meris [sic] panel. Endorsed for the Court by AMH, Motions Staff Attorney. [Entry date Apr 30 2007] [DH]
5/8/07	Appellant United States motion for an extension of time until June 6, 2007 to file a statement of interest, filed with proof of service. [Entry date May 10 2007] [DH]
5/16/07	Order FILED GRANTING motion for an extension of time by Appellant United States, endorsed on motion dated 5/8/2007. IT IS HEREBY ORDERED THAT the motion is GRANTED to this extent: when counsel is appointed pursuant to this Court's March 5, 2007 order the Clerk's ofice [sic] will enter a briefing schedule and the U.S. Government will be afforded an opportunity to file a brief. Endorsed for the Court by CJM, Sup. Staff Attorney. [Entry date May 17 2007] [DH]
5/17/07	Notice to counsel/pro se re: Motion Order dated 5/16/07. [Entry date May 17 2007] [DH]

5/30/07	Order filed stating A panel of this Court having sua sponte determined that counsel should be appointed, only for purposes of the motions to dismiss, to brief the issues identified in this Court's December 26, 2006, and March 5, 207 [sic] orders, IT IS HEREBY ORDERED that Lewis Zirogiannis, Hughes Hubbard & Reed LLP, One Battery Park Plaza, New York 10004, (212) 837-6446 be appointed as counsel for the Appellant. The Clerk's Office shall enter a briefing schedule forth-with and the U.S. Government will be afforded an opportunity to file a brief. IT IS FURTHER ORDERED that counsel may remove the record from the Clerk's office for use until the Appellant's brief is filed. Endorsed for the Court by TMW, Sup. Staff Attorney. [Entry date May 30 2007] [DH]
5/30/07	Notice to counsel/pro se re: Order dated 5/30/07. [Entry date May 30 2007] [DH]
6/7/07	APPELLANT Irwin Eisenstein, Form C filed, with proof of service. [Entry date Jun 11 2007] [RD]
6/7/07	APPELLANT Irwin Eisenstein, Form D filed, with proof of service. [Entry date Jun 11 2007] [RD]
6/12/07	Notice of appearance form on behalf ofpro [sic] se petitioner Raymond Jacobs, Esq., received. [Entry date Aug 2 2007] [RD]

7/11/07	Notice of appearance form on behalf of Lewis Zirogiannis, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Jul 17 2007] [RD]
7/12/07	Notice of appearance form on behalf of Lewis Zirogiannis, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Jul 12 2007] [DH]
7/27/07	Pre-Argument Conference Notice and Order from Lisa Greenberg, Scheduled For: 8/9/07, at 3:00 pm, Filed. [Entry date Jul 31 2007] [RD]
7/27/07	Scheduling order #1 filed. Record on appeal due 8/23/2007. Appellants brief due 8/30/2007. Appellees brief due 10/1/2007. Ready week 11/12/2007. (LG) [Entry date Jul 31 2007] [RD]
8/1/07	Notice of appearance form on behalf of Andrew Lipkin, filed. (Orig in acco, copy to Calendar and Admissions Dept.). [Entry date Aug 2 2007] [RD]
8/10/07	Scheduling order #2 filed. Appellants' motion to dismiss due 9/18/2007. Appellees brief or response to appellants' motion due 10/18/2007. Ready week 12/3/2007. [Entry date Aug 10 2007] [LY]
8/10/07	Notice to counsel in re: Scheduling order 2 [Entry date Aug 10 2007] [LY]
9/17/07	Order filed stating "It is hereby ordered that appointed counsel for the appellant shall file its

response to the motion to dismiss on or before 9/25/07; It is further ordered that the appellant pro se shall file its brief and any joint appendix on or before 9/25/07. It is further ordered that the appellee shall file its brief on the merits and any reply to the appointed counsel's response to the motion to dismiss on or before 11/2/07; It is further ordered that argument may be scheduled as early as the week of 12/10/07. By LG." [Entry date Sep 19 2007] [RD]

9/17/07 Letter from Irwin Eisenstein, requesting an extension of time to file a brief, received. [Entry date Sep 19 2007] [RD]

9/17/07 Letter from Irwin Eisenstein's appointed counsel, requesting an extension of time to file an opposition to the motion to dismiss the appeal, received. [Entry date Sep 19 2007] [RD]

9/18/07 APPELLANT Irwin Eisenstein, pro se brief FILED with proof of service. [Entry date Sep 24 2007] [RD]

9/18/07 APPELLANT Irwin Eisenstein, appendix filed w/pfs. [Entry date Sep 24 2007] [RD]

9/19/07 Notice to counsel in re: order dated 9/17/07. [Entry date Sep 19 2007] [RD]

9/25/07 Scheduling order #3 filed. Appellant's response to motion to dismiss due 10/1/2007.

	Appellant;s [sic] pro se brief due 10/2/07. Appellees brief due 10/31/2007. It is further ordered that the reply to the motion on behalf of the U.S. shall be filed on 11/9/07. Argument may be scheduled as early as the week of 12/17/07. [Entry date Sep 25 2007] [RD]
9/25/07	Notice to counsel in re: scheduling order dated 9/25/07. [Entry date Sep 25 2007] [RD]
10/1/07	Plaintiff-Appellant Irwin Eisestein's memorandum of law in opposition to motion dismiss the appeal, dismiss the appeal filed with proof of service. [Entry date Oct 2 2007] [RD]
10/4/07	Order filed in reference to docket nos. 06-3329-cv, and 06-3081-cv, stating, "Upon due consideration of judicial efficiency and economy, it is respectfully recommended to the presiding judge that the above-captioned appeals be heard in tandem. For the Court: LG." [Entry date Oct 4 2007] [RD]
10/4/07	Notice to counsel in re: order dated 10/4/07. [Entry date Oct 4 2007] [RD]
10/4/07	"Submission on Appeal" from Plaintiff Raymond Jacobs, received. [Entry date Nov 7 2007] [RD]
10/26/07	Defendant-Appellees' reply memorandum of law in further support of the motion dismiss the appeal, dismiss the

	appeal filed with proof of service. [Entry date Nov 7 2007] [RD]
11/1/07	APPELLEE The City of New York and its Contractors, defective filed. Notice sent to party to correct by 11/13/07. [Entry date Nov 1 2007] [RD]
11/6/07	Argument Requested – Local Rule 34 Acknowledgment Returned by APPELLANT Irwin Eisenstein, [All parties seek oral argument] [Entry date Nov 6 2007] [AV]
11/7/07	APPELLEES' The City of New York and its Contractors, brief filed with proof of service. [Entry date Nov 14 2007] [RD]
11/7/07	APPELLEE City of New York, defective document cured. Note: The appellee's brief has been corrected. [Entry date Jan 16 2008] [RD]
11/9/07	United States of America Amicus brief, in support of motion to dismiss, as per order dated 12/26/06, filed with proof of service. [Entry date Nov 14 2007] [RD]
11/21/07	Submission Requested – Local Rule 34 Acknowledgment Returned by APPELLANT United States, [Some agree to submit] [Entry date Nov 21 2007] [AV]
11/26/07	Argument Requested – Local Rule 34 Acknowledgment Returned by APPELLANT Irwin Eisenstein, [All parties seek oral argument] [Entry date Nov 26 2007] [AV]

4/21/08	Proposed for argument the week of 6/23/08 [Entry date Apr 21 2008] [CA]
5/1/08	Papers (Motion requesting the Court to take notice of a new decision from APPELLANT Irwin Eisenstein, received. [Entry date May 2 2008] [MR]
5/2/08	Pro se letter sent to attorney. [Entry date May 2 2008] [MR]
5/13/08	Set for argument on 6/24/08 [Entry date May 13 2008] [SC]
5/21/08	Calendar argument notice mailed to attorneys/parties. [Entry date May 21 2008] [LY]
6/24/08	Case heard before WINTER, MINER, CABRANES, C. JJ. CD Date: 6/24/08 [Entry date Jun 24 2008] [LY]
6/25/08	APPELLEE City of New York, 28(J) letter dated 6/24/08 FILED. [Entry date Jun 25 2008] [JR]
6/27/08	Letter received from attorney Lewis D. Zirogiannis dated June 27, 2008 in response to Defendant's-Appellees' F.R.A.P. 28(j) letter [Entry date Jun 30 2008] [JT]
8/19/08	The City's motion to dismiss is GRANTED by published signed opinion filed. (RKW) [Entry date Aug 19 2008] [YS]
8/19/08	Judgment filed. [Entry date Aug 19 2008] [YS]

8/19/08	Notice to counsel in re: Opinion filed. [Entry date Aug 19 2008] [YS]
8/19/08	Order FILED GRANTING motion dismiss the appeal by Appellee City of New York. See opinion filed on 08/19/2008. [Entry date Aug 19 2008] [YS]
8/29/08	APPELLEE City of New York, itemized and verified bill of costs received, w/pfs. [Entry date Sep 2 2008] [YS]
9/2/08	Court's request for the pdf (e-document) version of Andrew Lipkin Bill of Costs, sent. [Entry date Sep 2 2008] [YS]
9/3/08	Letter received from Andrew Lipkin, attorney for the Defendants-Appellees, requesting to withdraw previously filed bill of costs. [Entry date Sep 3 2008] [YS]
9/3/08	Court's request for the pdf (e-document) version of Andrew Lipkin letter requesting withdrawal of the bill of costs, sent. [Entry date Sep 3 2008] [YS]
9/5/08	IT IS HEREBY ORDERED that in light of Appellees' letter dated 09/02/2008, the Appellee's bill of costs is hereby withdrawn. (By: JP) [Entry date Sep 5 2008] [YS]

9/5/08	Notice to counsel in re: Order filed on 09/05/2008. [Entry date Sep 5 2008] [YS]
9/9/08	Note: The OPINION PRICE is $2.60 [Entry date Sep 9 2008] [CK]
10/31/08	Judgment MANDATE ISSUED. CLOSED [Entry date Oct 31 2008] [YS]
11/13/08	Mandate receipt returned from the district court. [Entry date Nov 13 2008] [RL]
12/4/08	Notice of filing petition for Appellants dated 11/17/2008 filed. Supreme Court #: 08-660. [Entry date Dec 5 2008] [YS]
1/26/09	Letter dated 01/16/2009 from the Supreme Court advising of order GRANTING the petition for writ of certiorari by Appellants, filed. (Supreme Court # 08-660) [Entry date Jan 27 2009] [YS]
1/26/09	Writ of Certiorari GRANTED. [Entry date Jan 27 2009] [YS]
1/27/09	Letter sent to district court recalling mandate in light of order dated 01/16/2009 received from the Supreme Court, GRANTING petition for writ of certiorari. [Entry date Jan 27 2009] [YS]

1/27/09	ORDER FILED recalling mandate in light of Supreme Court Order GRANTING petition for Writ of Certiorari. [Entry date Jan 27 2009] [YS]
1/28/09	Notice to counsel in re: Mandate recall. [Entry date Jan 28 2009] [YS]

Irwin Eisenstein
601 B Surf Ave. Apt. 17k
Brooklyn, N.Y., 11224
718-996 6914

United States Southern District Court of New York

----------x

United States Ex Rel
Irwin Eisenstein et al

Plaintiff-

-AGAINST-

City of New York,
Michael Bloomberg,
John Doe, and Jane Doe,

Defendants

----------x

Docket No. CIV

Complaint

Jury Trial Demanded

Parties

Petitioners

All petitioners allege that the City of New York is improperly collecting an amount of money as a condition of employment ("tax"' [sic]) that impacts non-resident employees inequitably, violates their Constitutional Rights, and results in fraud against the Federal Government. This will be explained more completely in the following complaint. Additionally, the Appendix contains "Segments of a Brief" that was submitted to the New York State Tax Tribunal. The

initial decision by the Tax Tribunal failed to address the Constitutional issues raised by the Brief. The Brief compares and contrasts the Constitutional question raised by Section § 1127 of the New York City Charter, with another Tax Question that is comparable, that was decided by the United States Supreme Court (See *LUNDING ET UX. NEW YORK TAX APPEALS TRIBUNAL ET AL. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK No. 96-1462*).

10 Irwin Eisenstein, is a resident of New York City and lives at 601 B Surf Ave. Apt. 17k, Brooklyn, New York 11224. Plaintiff, a relator, who has become aware of certain inequitable local tax laws that violate the United States Constitution and may result in a short fall in taxes collected by the Federal Government.

20 Barbara Daly, is a resident of New Jersey, living at 55 Spring Avenue, Bergenfield, New Jersey, 07621, who works for the City of New York, who is required to pay a condition of employment that impacts her earnings differently than employees who work for and live in the City of New York. Ms. Daly lives in New Jersey. She alleges that this condition of employment is discriminatory toward New Jersey residents, and alleges that this contractual agreement violates her civil and Constitutional Rights.

30. Priscilla Aitkin, is a resident of , Nassau County, living at 8 Marlin Court, Sea Cliff, New York, 11579, who works for the City of New York, who is required to pay a condition of employment fee that impacts her

earnings differently than employees who work for and live in the City of New York. Ms. Aitkin lives in Long Island, and alleges that this condition of employment violates her Constitutional Rights.

40.

50. Ellen Koop is a resident of White Plains, New York, living at 21 Gilbert Place, White Plains, N.Y. 10604, who works for the City of New York, who is required to pay a condition of employment fee that impacts her earnings differently than employees who work for and live in the City of New York. Ms. Koop lives in White Plains New York, and alleges that this condition of employment violates her Constitutional Rights.

60. Joanna Augugliaro is a resident of New Hamburg, New York, living at 21 Main Street, New Hamburg, NY 12590, who works for the City of New York, who is required to pay a condition of employment fee that impacts her earnings differently than employees who work for and live in the City of New York. Ms. Augugliaro lives in New Hamburg, New York, and alleges that this condition of employment violates her Constitutional Rights.

Defendants

70 Michael Bloomberg, in his administrative capacity as the Mayor of New York, administers the laws of the City of New York, and is responsible for any violations of law and Constitutional rights.

80

90 John and Jane Doe is/are parties who know about this cause of action, however, in their administrative, or executive capacity have failed to act upon these violations of rights, and are being sued as individual(s) acting under color of law, in their official capacity failing to protect individuals against constitutional rights violations.

Other Possible Defendants

100 Any New York City and New York State Defendants will be served via the Attorney Generals Office, and City Corporate Counsel, at the addresses noted below. This will occur after the Justice Department reviews the sealed complaint.

New York City Law Department, **Michael A. Cardozo, Corporation Counsel**, Office of the corporation Counsel, 100 Church Street, New York, NY 10007-2601 (212) 788-0303 http://home.nyc.gov/html/law/home.html

The Questions Presented

120 Whether the New York Charter Section § 1127 is facially in violation of the United States Constitution Article IV, Sec II (Privileges and Immunities Clause), results in a reduction of Federal taxes collected, violates the Commerce Clause of the United States Constitution (Article I, § 8, ¶ 3), and the Equal Protection and Due Process Clauses of the United

States Constitution (The Fourteenth Amendment, The Fifth Amendment) when a higher federal authority in *Lunding v New York State Tax Authority* determined that a similar New York State statute was discriminatory toward non-resident citizens of New York State and violated the United States Constitution.

Whether under contract law theories, including equity, adhesion, agency, restitution, unjust enrichment, misunderstanding, relation back, and others, the City of New York and the State of New York are *unjustly* rewarded when petitioners who are non-resident City employees are required to pay the *Section § 1127* amount, and the result is that their combined City and State taxes, and Section §1127 amounts are greater than the amounts paid as taxes by resident employees.

Explanation Of The Cause Of Action

140 Many of the issues raised in this complaint are explained, in part, in the brief attached to this complaint in Appendix A.

160 The City of New York, and many of its' Agencies, when hiring employees, force new employees to sign a contractual waiver that allows the City to automatically deduct money from employee pay checks using Section § 1127 of the City Charter. This provision is intended to allow an equivalent amount to be deducted from the income of non-resident employees as a "*condition of employment*" as City

residents pay in City tax. *Not all non-resident City employees pay this "Tax"*. Employee's who are aligned with State Agencies, who live outside of the five boroughs are not required to pay this "tax". Consultants who work for the City of New York, who live outside of the five boroughs are not required to pay this "tax". This tax or contractual amount is applied selectively!

180 The forms required to file section § 1127 rely upon Federal and State Income Tax forms. (See Appendix B for the § 1127 forms and instructions). To be in compliance with Section § 1127 one must include all income earned in a household. This may include income derived outside of the State or City of New York. Interest and dividend income is usually apportioned based upon the salaries of a married couples. This occurs even when the interest is distinguishable, and can be assigned to one party or another in a household.

200 There is no lawful provision that allows these City employees who are not City residents to deduct the amount deducted under this provision as a tax in their home state. They may be required to use the amount taken by New York City as an expense item when filing State, or Federal Taxes, Expense items do not get the same favored tax treatment as a local tax when filing an out of state, or within New York State Tax return. This places New York City non-resident employees at a significant tax disadvantage! We allege that this violates the Privileges and Immunities Clause of the United States Constitution.

220 Alternative approaches in deriving income and allowing for this disparity between non-resident employees, and resident employees can be developed so that the amount deducted under any City contractual waiver has the same impact on employees who are City residents and employees who are not City residents. However, this has not been done in the twenty-nine years that this statute has been in effect.

240 The practice and policy followed by New York City does not even rely upon just the income earned within the City of New York, or from employment by the City of New York.

This Action Is Limited In Scope

260 This action is limited, Some of the following questions are raised:

a. Does the New York City Charter Section § 1127 meet Constitutional muster and comply with the Privileges and Immunities Clause, and the Commerce Clause of the United States Constitution? (See the United States Constitution Article IV, Sec II; See also Article I, §8, ¶ 3)?

b. Does the New York City Charter Section § 1127 violate the "Due Process" and "Equal Protections" Clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

c. Is the New York Contractual Requirement enforced differently and inequitably for some City Employees, when the City hires consultants who live

out of the City who are not impacted by Section § 1127, when the statute does not distinguish between employees who are consultants?

d. Is Section § 1127 Vague in part, and selectively enforced?

e. Does the resulting enforcement of this section of the New York City Charter result in excessive expense claims made in Federal Tax returns that in turn result in Fraud against the Federal Government?

280 In 1998, the United States Supreme Court decided a case that is similar in part to this action. The issue in the decided case related to the inequitable treatment of a New York State Tax and the impact of that tax on out of state residents. Section § 1127, we allege, violates several Constitutional rights and provisions as outlined more completely in the complaint, and in the attached brief. This controlling case, and the issues raised are explained more completely in the brief that is included as appendix A. Petitioners allege that both the majority and minority opinions support the position taken by petitioners.

300 Since 1998, and for a period of five years, when this United States Supreme Court case was decided, we allege that the City of New York has been violating the Constitutional and Civil Rights of employees who live outside the City, but work in the City for the City of New York (This action is brought primarily against the City of New York, but Petitioners believe similar statutes exist in other large political

subdivisions of the State of New York.) Before testing the other statutes, petitioners first want to challenge the New York City Statute that impacts them directly.

Jurisdiction

Federal Causes Of Action

320 This sealed action is filed based upon the following Federal and State causes of action, but is *not* limited to the laws included:

31 U.S.C. §§ 1329 et seq., (The False Claims Act, Qui-Tam), and all other appropriate Federal Statutes and pendant State Claims;

The Fourteenth and Fifth Amendments to the United States Constitution;

The Privileges and Immunities Clause of the United States Constitution (Article IV, Sec II);

The Commerce Clause of the United States Constitution (Article I, § 8, ¶ 3)

28 U.S.C. § 1346 (Torts against the United States);

Possibly, 18 U.S.C. § 1961 (RICO); Rico actions may be prosecuted both civilly, and criminally.

(Petitioners understand that they *may* not bring criminal charges against the defendants, however, plaintiffs recognizes that the Justice Department does have the authority to bring criminal charges, and may bring actions against State actors (See

Justice Ginsburg's concurring opinion in VERMONT AGENCY OF NATURAL RESOURCES, v. UNITED STATES ex rel. STEVENS (No. 98-1828).)

State Causes Of Action

360 Additionally, petitioners request that all pendant state claims, including but not limited to, and related to the employment of City government agencies, be applicable to this action (See *Federal Rules of Civil Procedure 18* (FRCP) pendant state claims). *FRCP 19* will be invoked to insure that necessary parties are included or joined in this action.

380 New Jersey, and New York State Citizens are asserting their rights under the Privileges and Immunities Clause of the United States Constitution based upon their inability to use Section § 1127 as a tax deduction when New Jersey State Income Taxes are reported and filed (This action is also applicable to New York City Employees who live in Connecticut).

400 New Jersey and New York State Citizens are asserting their rights under the Commerce Clause of the United States Constitution based upon the impact on commerce of Section 1127.

420 The State law violations include but are not limited to:

The prevailing rate of wage "contract provision required by New York's "Little Davis-Bacon Act.";

The N.Y. Pub. Auth. Law §1734 (McKinney 2000);

The N.Y. Lab Law §220 (McKinney 2000);

Private Causes Of Action

440 We are pleading Civil Rights causes of action, because individuals who are employees of the City of New York, who live outside of New York City and State are regularly, systemically, required to pay *additional* "taxes" that are not paid by New York City Residents who are employed by the City of New York.

460 We believe that these causes of actions exist, and that many of the out of City, City workers, hired and forced to sign the City Section § 1127 waiver, were being forced to sign these contractual agreements without prior knowledge. These contracts are Adhesion Contracts, and must be considered unconstitutional.

History Of The Action

500 This action is being filed, in part, as individuals on behalf of the United States Government. Mr. Eisenstein, "et al.", demand a Jury trial. The basis of the action is that the petitioner has information indicating that wages paid by the City of New York always are inequitable when a City worker lives outside of the five boroughs. Since the amount paid under Section § 1127 cannot be deducted as a tax, non-resident City employees are effectively paid a lower wage.

520 Out of City workers cannot deduct the 1127 waiver amount as a tax. It is not used as an offset, but as an expense. The result is that out of City workers, at most, receive a deduction of 38% on their Federal Income Tax for declaring this "tax" as an expense, while City resident employees can deduct 100% of the amount as a local tax on their Federal tax returns. This same issue is present when the non-resident worker deducts the section § 1127 from either their New York State, Connecticut, or New Jersey Tax returns.

540 The enforcement of Section § 1127 establishes a "condition of employment" that treats one type of employee differently than other types of employees who are doing the same job.

560 The wage scale of City employees doing similar jobs is different based upon the impact of the Section § 1127 "tax", or "condition of employment".

560 When out of City workers declare the Section § 1127 amount as a business expense, it results in a higher deduction than would be available if this amount were equitable. The City fails to take into account the tax consequences of the "1127" on non-resident employees. The result is that out of state employees are being required to pay more than employees who live in the City. The result is that their deduction is larger on the Federal Tax returns and they pay less in Federal Taxes. An example of this type of process follows:

If a person earns $20,000 and

Pays $2,000 as a City tax, their income is reduced and they pay taxes to the Federal government based upon **$18,000**. (This would not change).

The non-resident uses the $2,000 collected by the City under Section § 1127 as a business expense, and that results in a reduction of income of :

20,000 - (.28 x 2,000) or $560 and they pay income tax on **$21,440**.

If the amount removed from their salary was less, the expense would be smaller, and more income would be available for Federal taxation. The individual would benefit since net income would increase. The Federal government would benefit since the amount that would be used for Federal Tax would not include the same large expense.

580 In addition to the disparate treatment by the Federal Tax system, those employees who live in New Jersey or Connecticut cannot deduct the New York City Section § 1127 deduction as a tax on their states taxes. It is clear that the non-resident City employees are always impacted in a disproportional manner by Section § 1127. This violates the Privileges and Immunities Clause of the Constitution. Any calculations made in determining Section § 1127, should at the very least, be adjusted so that non-resident employees are not regularly impacted adversely by this "tax" that is applied under the guise of a contract. The amount deducted automatically *should* be adjusted by the City to reflect the difference in tax

consequences. The amount deducted directly from the pay of non-resident employees for Section § 1127 should be less, and that should be reflected as an expense item. When an expense item is lower, the Federal Tax amount is increased. This difference when calculating taxes *for at least 15,000* non-resident employees of New York City is significant. If this position taken in this complaint is upheld under the False Claims act, then the statute allows for recovery going back ten years. Under New York State law recovery in contract law allows for a six-year recovery period.

600 We allege that not only was the past practice unlawful, but it impacted non-resident employees in a way that was unconstitutional and resulted in the systemic underpayment of Federal Taxes. If the United States Justice Department does not concur with the calculations, or the theory of the "Fraud" cause of action, petitioners still have a cause of action based upon the "Privileges and Immunities" and "Commerce" Clauses of the Constitution, as well as under state causes of action because the enforcement of the 1127 provision results in a lower hourly wage for non-resident employees.

Section § 1127 Is Not Entered Into Fairly Through Reasonable Negotiations

620 Section § 1127 violates contract law because the contracts entered into are not entered into fairly, by parties who had equal bargaining power. The

contractual agreements were drafted by the City of New York. They are not shown to many prospective employees until after the employees are hired. At that time, it becomes difficult to refuse to sign the agreement. The result would be that the employee would be terminated by the City. In many instances, the employees have already given notice to their employers, and no longer have a job.

640 A contract of adhesion is a contract formed as a "product of a *gross inequality of bargaining power*" between parties. *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996). Courts can overturn, provisions of contracts when they are not fair. One court said:

> At bottom, it is a notion evolved from public policy that refuses to enforce a contract provision when it offends basic notions of civility and fair play. It may not be invoked to trump the clear language of the agreement unless there is a disturbing showing of unfairness, undue oppression, or unconscionability. *See Carnival Cruise Line, Inc. v. Shute*, 499 U.S. 585, 593 (1991); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1181 n.1 (2d Cir. 1977).

660 When the party entering into an adhesion contract is faced with not being hired, or remaining employed by the City, there is a limited choice. Many individuals are not told of the "1127" requirements until after they quit their job, and are hired by the City. Other individuals who live within the city, and then move out of the city, never realize that they are

required to pay the section 1127 "*tax*" without receiving the tax benefit given to employees who live in the City.

Causes of Action

680 Each and every allegation stated in this complaint, and the accompanying action, is re-alleged and is incorporated herein by reference for all following causes of action as if stated therein. As a first cause of action, the Constitutionality of the Section § 1127 is being questioned. This condition of employment violates the Privileges and Immunities and Commerce Clauses of the United States Constitution.

700 Not only is this a local action, it is an interstate action since many of the individuals impacted commute between several states. New York City by recruiting and hiring individuals who have specific skills that may not be available within the City or State, does business in several states.

First Cause of Action

720 Under the False Claims Act (*31 U.S.C. §§ 1329 et seq.*) petitioners are claiming that the improper, unjust application of Section § 1127 of the City Charter results in lower Tax collections on the Federal Level, and this, in turn allows recovery under the False Claims Act.

Second Cause of Action

The application of Section § 1127 results in violations of the Privileges and Immunities Clause of the United States Constitution, and the resulting over assessment of a contractual amount based upon either a "tax" or a condition of employment violates constitutional rights.

Third Cause of Action

740 The impact of Section § 1127 results in impeding interstate commerce and is selectively applied only to Civil Service Employees from specific agencies. It is not applied to out of state consultants, or consulting firms. This process impacts interstate commerce. Petitioners allege that the hiring of employees from other jurisdictions impacts commerce in at least two ways that have been enumerated in Morrison and Lopez, that make this a federal cause of action (See *U.S. v. Morrison*, 120 S.Ct. 1740 (2000); see also *U.S. v. Lopez*, 514 U.S. 549 (1995)).

Fourth Cause of Action

760 The defendants are violating New York State Law related to paying fair wages. Employees who are not subject to the Section § 1127 condition of employment are paid more than employees who are required to file § 1127 statements, and pay the corresponding "tax" or condition of employment. The result is a small but significant difference that always impacts 1127 employees.

This, petitioners allege, violates New York State Labor law.

Discovery Is Being Requested

780 In order to find all plaintiffs who are impacted by this action, we demand discovery from the City of New York, and the State of New York. These organizations have, or should have, the names and addresses of all parties who have wages withheld under the Section § 1127 of the New York City Charter. Rule 9(b) allows discovery and leeway when making allegations when information is being held exclusively by the defendant(s).

800 If not granted relator status, Petitioners request the right to prosecute this action *on their own behalf*, or alternatively to have this action granted class status under FRCP 23. At that time, petitioners would try to interview and/or hire an attorney, or attorneys to represent the class.

820 Even if granted relator status, petitioners recognize that the number of parties impacted in this action is very large, and assistance will be required by other groups to pursue the interests of all impacted parties and members.

840 Petitioners are not averse to negotiating a settlement that would correct past inequities and insure that future treatment is equitable.

The False Claims Act (FCA)
Is Applicable To This Action.

860 The FCA is applicable against private actors who knowingly assist or fail to report the false claims, or information that may result in false claims. Although the United States Supreme Court determined that States may not be sued on behalf of the United States under the FCA, no determination has been made related to the status of municipal entities. Additionally, the Supreme Court in a concurring decision by Justice Ginsburg said that the United States may, in fact, bring an action against a State and certainly against a local government. The issue raised by this action, has, in part, been raised before a court of incompetent jurisdiction (The New York State Tax Appeals Tribunal does not have the authority to determine the Constitutionality of a City Statute). The statute 31 U.S.C. § 3129 defines Knowingly as follows:

> "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

880 The Defendants by policy, procedure and general practice have acted to "knowingly assisted in defrauding the government by failing to rule or assist in modifying the current policies, practices, and procedures used by the City of New York in allocating and collecting money under Section § 1127 of the New York City charter. The statute says:

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information – has actual knowledge of the information;

acts in deliberate ignorance of the truth or falsity of the information; or

acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

Petitioners Request The Following Relief

Petitioners request that this action be accepted as a false claims action by the Federal government. Alternatively, they would request that they be granted relator status. In either case, the petitioners request that they be allowed to prosecute this action so that the statute may be found to be unconstitutional.

CONCLUSION

For all of the reasons stated, petitioners are requesting that the Justice Department intercede in this matter. However, if the Justice Department believes that it cannot at this time intercede, we request that we be granted relator status to pursue this action on behalf of the United States.

We have been reviewing this action for a period of time, and believe that over-collection of employment fees results in a reduced Federal Tax base, and the resulting smaller tax paid to the Federal Government.

If in fact, the government declines false claims relator status, petitioners request that petitioners be allowed to pursue other remedies. This may include class certification, allowing and authorizing the petitioners to hire attorneys to pursue the interests of the class (FRCP 23).

For the Plaintiffs

Petitioner certifies that the statements and allegations in this complaint are true to the best of his knowledge, and he may be held for perjury if they are not correct.

Date: January 25, 2003 (OB)

/s/ Irwin R. Eisenstein
Irwin R. Eisenstein, for plaintiffs
601b Surf Ave. 17k
Brooklyn, New York, 11224,

THE APPENDIX

The appendix to this complaint contains documents that complement the brief. Appendix A is especially helpful when reviewing the constitutional issues raised.

Appendix A – This brief reviews both contractual issues raised, constitutional issues, and compares this action with the decision made by the United States Supreme Court in Lunding (See LUNDING ET UX. NEW YORK TAX APPEALS TRIBUNAL ET AL. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK No. 96-1462). Most of the Brief was submitted to the Tax Appellate Authority. The arguments were rejected in part by the Tax Appeals Tribunal, a court of limited Jurisdiction. The Issue related to the Constitutionality of Section § 1127 is still before a New York State Tax Appeals Court. However, the false claim is beyond the scope of a State court.

Appendix B – This appendix contains the form and instructions for filing and being in compliance with Section § 1127 of the City Charter.

Appendix C – This appendix contains Section § 1127, the Statute being questioned, with commentaries

Appendix D – This appendix contains the Decision of the Court of Appeals allowing the City to Collect money contractually (The action was

never, to petitioner's knowledge ever addressed or appealed to the United States Supreme Court (See LEGUM. V GOLDIN, 432 N.E.2d 772, 55 N.Y.2d 104).

Appendix E – The United States Decision in Lunding v New York State Tax Appellate Tribunal *has not* been included but is available in the United States Reports.

JAMES B. COMEY
United States Attorney for the Southern District of New York
By: SHEILA M. GOWAN (SG: 8201)
Assistant United States Attorney
33 Whitehall Street
New York, New York 10004
Tel. No.: (718) 422-5615

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.* IRWIN EISENSTEIN, *et al.*,	:	
Plaintiffs,	:	
– against –	:	03 Civ. 0413 (DAB)
THE CITY OF NEW YORK, MICHAEL BLOOMBERG, JOHN DOE AND JANE DOE,	:	
Defendants.	:	

THE GOVERNMENT'S NOTICE OF ELECTION TO DECLINE INTERVENTION

Pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the United States notifies the Court of its decision not to intervene in this action.

Although the United States declines to intervene, the United States respectfully refers the Court to 31 U.S.C. § 3730(b)(1), which allows the relators to

maintain the action in the name of the United States; providing, however, that the "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.*

Therefore, the United States requests that, should either the relators or defendants propose that this action be dismissed, settled, or otherwise discontinued, this Court solicit the written consent of the United States before ruling or granting its approval.

Furthermore, pursuant to 31 U.S.C. § 3730(c)(3), the United States requests that all pleadings filed in this action be served upon the United States. The United States also requests that orders issued by the Court be sent to the Government's counsel by plaintiffs. The United States reserves its right to order any deposition transcripts. The United States also reserves its right to intervene in this action, for good cause, at a later date.

A proposed order accompanies this notice.

Dated: New York, New York
February 24, 2003

Respectfully submitted,

JAMES B. COMEY
United States Attorney for
the Southern District of New
York Attorney for the United
States of America

By: /s/ Sheila M. Gowan
SHEILA M. GOWAN
(SG-8201)
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White Plains, New York 10604

Joanna Augugliaro
21 Main Street
New Hamburg, NY 125909

Plaintiffs-relators *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.* IRWIN EISENSTEIN, *et al.*, Plaintiffs, – against – THE CITY OF NEW YORK, MICHAEL BLOOMBERG, JOHN DOE AND JANE DOE, Defendants.	ORDER 03 Civ. 0413 (DAB)

The United States having declined to intervene in this action pursuant to the False Claims Act, 31 U.S.C. § 2703(b)(4)(B), the Court rules as follows:

IT IS ORDERED that,

1. The complaint shall be unsealed, and service upon defendants by the relators is authorized.

2. The Government's Notice of Election to Decline Intervention shall be served by the plaintiffs-relators upon defendants only after service of the complaint.

3. The seal shall be lifted as to all other matters occurring in this action after the date of this Order.

4. The parties shall serve all pleadings and motions filed in this action, including supporting

memoranda, upon the United States, as provided for in 31 U.S.C. § 3730(c)(3). The United States may order any deposition transcripts. The United States is entitled to intervene in this action, for good cause, at any time.

5. All orders of this Court shall be sent to the United States by plaintiffs-relators.

6. Should the plaintiffs-relators or the defendants propose that this action be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the United States before ruling or granting its approval.

SO ORDERED

/s/ Deborah A. Batts
UNITED STATES
DISTRICT JUDGE

Dated: March 20, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Ex rel. IRWIN EISENSTEIN, *et al.*, Plaintiffs, – against – THE CITY OF NEW YORK, MICHAEL (DAB) (FM) BLOOMBERG, JOHN DOE AND JANE DOE, Defendants.	**Notice of Appeal In a Civil Case** **TO DISMISS** **03 Civ. 0413 (DAB)** **Docket No.** (Filed Jun. 5, 2006)

Notice is hereby given that Irwin Eisenstein, et al., hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment:

Granting the Defendants a 12(b)(6) dismissal of the False Claim action, the Dormant Commerce Clause, the Privileges and Immunities clause, and all other state claims, and the failure of the court to certify a class or to allow Plaintiff Eisenstein to proceed until class status was granted.

Entered in this action on the 12th Day of April, 2006.

Dated: New York, New York June 5, 2006 (OB)

Irwin Eisenstein, Plaintiff
7925 Sloop Pl. 106
Orlando, FL. 32825
(718) 288 7832 (cell)
Ironstone@pipeline.com
For Plaintiff(s)

The United States was a party and the appeal can be filed within 60 days.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA Ex rel. IRWIN EISENSTEIN, et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, MICHAEL BLOOMBERG, JOHN DOE AND JANE DOE,

Defendants.

----------x

AFFIRMATION OF SERVICE

03 Civ. 0413 (DAB)
Docket No

I, IRWIN R. EISENSTEIN, DECLARE UNDER penalty of perjury that I have served a copy of the attached letter to the clerk, notice of appeal, and affirmation of service upon the U.S. Justice Department, S.D.N.Y., the City of New York, and the other plaintiffs (by electronic email), at the addresses noted below:

David N. Kelley, United States Attorney, So. District of N.Y. **By: SHEILA M. GOWAN (SG: 8201), US AAG, 86 Chambers St.** New York, New York 10007, Tel. No: (xxx) xxx-xxxx

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street, Room 5-207
New York, N.Y. 10007
Of Counsel: George P. Lynch
Tel: (212) 788-0844

The Other plaintiff(s) have been served by email

DATED: June 5, 2006, New York
June 5, 2006

/s/ Irwin R. Eisenstein
7925 Sloop Pl. 106
Orlando, Florida, 32825

Irwin R. Eisenstein
7925 Sloop Pl. apt 106
Orlando Fl. 32825
ironstone@pipeline.com cell (718) 288 7832

June 5, 2006 **(or before)**

Pro Se Clerk, (212) 805-0175, United States District Court, Judge Deborah A. Batts, Southern District of New York, United States Courthouse, 500 Pearl Street, New York, NY 10007-1312

David N. Kelley, United States Attorney, Southern District of N.Y. **By: SHEILA M. GOWAN (SG: 8201), US AAG, 86 Chambers St.** New York, New York 10007, Tel. No: (xxx) xxx-xxxx

MICHAEL A. CARDOZO, Corporation Counsel City of New York Attorney for Defendants, 100 Church Street, Room 5-207, New York, N.Y. 10007, Of Counsel: George P. Lynch, Tel: (212) 788-0844

Other parties by Email

Re: United States, ex rel. Eisenstein et al. v. THE CITY OF NEW YORK, MICHAEL BLOOMBERG, JOHN DOE AND JANE DOE
Docket No. 03 Civ 0413 (DAB)

Dear Clerk:

I have included a notice of appeal, an affirmation of service and a check for $455 made out to the clerk of the USDC, SDNY.

I am also indicating to you, by this letter that I will be in Europe for most of July, taking a course in International Human Rights with Justice Kennedy of the U.S. Supreme Court.

I should be available until the end of June, and will return in August.

If you need to contact me, you can still use my cell phone for messages, and I can write or email the clerk of the court.

Sincerely,

/s/ Irwin R. Eisenstein
Irwin R. Eisenstein

S.D.N.Y.
03-cv-413
Batts, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse at 500 Pearl Street, in the City of New York, on the 26th day of December, two thousand and six,

Present:

Hon. Rosemary S. Pooler,
Hon. Robert D. Sack,
Hon. Richard C. Wesley,
Circuit Judges.

United States of America *ex rel.*
Irwin Eisenstein, *et al.*,

Plaintiffs-Appellants,

v.

City of New York, *et al.*,

Defendants-Appellees.

06-3329-cv

(Filed Dec. 26, 2006)

Appellant seeks to appeal the district court's order dismissing his *qui tam* action brought on behalf of the United States. However, the Appellant filed his notice of appeal fifty-four days after the district court's entry

of judgment. Upon due consideration, the parties and the United States are ORDERED to brief the issue of whether the thirty-day time limit for filing a notice of appeal, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), or the sixty-day time limit for filing a notice of appeal, pursuant to Rule 4(a)(1)(B), which applies when the United States is a party, applies to a *qui tam* action where the United States declines to intervene in the proceedings. *See United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (holding that the sixty-day time limit applies); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004) (same); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996) (same); *but see United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978) (applying the thirty-day time limit). The briefs required by this order must be filed within thirty days of the entry date of this order.

FOR THE COURT:
Thomas Asreen, Acting Clerk

By: /s/ Olivia M. George
Olivia M. George, Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 06-3329 CV

Motion for: Dismissal of Appeal

Set forth below precise, complete statement of relief sought:

Dismissal of Appeal – Notice of Appeal not timely filed; pro se litigant may not prosecute False Claims Act action

United States of America ex rel. Irwin Eisensten, et al.

v.

City of New York et al.

MOVING PARTY: Sua Sponte by Court

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Irwin Eisenstein

MOVING ATTORNEY: Andrew G. Lipkin

[name of attorney, with firm, address, phone number and e-mail]

Michael A. Cardozo
Corporation Counsel of the City of New York
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Please check appropriate boxes:

Has consent of opposing counsel:

A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No

Is oral argument requested: ☐ Yes ☒ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☒ No
If yes, enter date

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☒ No

Has this relief been previously sought in this Court? ☐ Yes ☒ No

Requested return date and explanation of emergency:

NA

Signature of Moving Attorney:

/s/ Andrew G. Lipkin **Date:** 1-22-06
AL-6457

Has service been effected? ☑ Yes ☐ No
[Attach proof of service]

ORDER

Before: Hon. Rosemary S. Pooler, Hon. Robert D. Sack, Hon. Richard C. Wesley, *Circuit Judges*

IT IS HEREBY ORDERED that the motion to dismiss is referred to the panel that will decide the appeal; *pro bono* counsel shall be appointed for *pro se* Appellants only for purposes of the motion to dismiss to brief the two issues raised: (1) whether the 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) for filing a notice of appeal, or the 60-day time limit in Rule 4(a)(1)(B), applies to a *qui tam* action in which the United States declines to intervene; and (2) whether a litigant may bring a *qui tam* action *pro se*.

FOR THE COURT:
THOMAS W. ASREEN, Acting Clerk
by

Mar. 5 2007
Date

/s/ Tracy W. Young
Tracy W. Young
Motions Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America, ex. rel. Irwin Eisenstein, *et al.*, Plaintiffs-Appellants, v. City of New York, *et al.*, Defendants-Appellees.	06-3329-cv (Filed May 30, 2007)

A panel of this Court having *sua sponte* determined that counsel should be appointed, only for purposes of the motion to dismiss, to brief the issues identified in this Court's December 26, 2006 and March 5, 2007 orders,

IT IS HEREBY ORDERED that

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be appointed as counsel for the Appellant. The Clerk's Office shall enter a briefing schedule forthwith and the U.S. Government will be afforded an opportunity to file a brief.

IT IS FURTHER ORDERED that counsel may remove the record from the Clerk's office for use until the Appellant's brief is filed.

FOR THE COURT:
Thomas Asreen, Acting Clerk

By: /s/ Tamala M. Wayne
Tamala M. Wayne
Supervisory Staff Attorney

PETITIONER'S BRIEF

122

(5)

No. 08-660

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Where the United States elects not to proceed with a *qui tam* action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a "party," or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?

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BRIEF FOR PETITIONER

Petitioner respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dismissing the appeal as untimely, is reported at 540 F.3d 94 (2d Cir. 2008). (Pet. App.[1] 1a-15a.) The opinion of the United States District Court for the Southern District of New York is unreported. *See* No. 03 Civ. 413 (DAB), 2006 WL 846376 (S.D.N.Y. Mar. 31, 2006) (reprinted at Pet. App. 16a-43a).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 19, 2008. (JA[2] 19.) A timely petition for a writ of certiorari was filed on November 17, 2008. This Court granted the petition on January 16, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

---

[1] "Pet. App." refers to the Petitioner's Appendix filed in this Court with the petition for a writ of certiorari on November 17, 2008.

[2] "JA" refers to the Joint Appendix filed in this Court.

STATUTES AND RULES INVOLVED

1. 31 U.S.C. § 3730(b)(1):

   A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

2. 31 U.S.C. § 3730(c)(3):

   If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

3. Fed. R. App. P. 4(a)(1)(A):

   In a civil case, . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

4. Fed. R. App. P. 4(a)(1)(B):

   When the United States or its officer or agency is a party, the notice of appeal may be

filed by any party within 60 days after the judgment or order appealed from is entered.

5. Fed. R. Civ. P. 17(a):

(1) An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

STATEMENT

A. Introduction

A notice of appeal must be filed within 60 days after entry of judgment when the United States (the "Government") is a "party" to the action. *See* Fed. R. App. P. 4(a)(1)(B); 28 U.S.C. § 2107(b). The notice of appeal must otherwise be filed within 30 days after entry of judgment. *See* Fed. R. App. P. 4(a)(1)(A); 28 U.S.C. § 2107(a). In this case, the notice of appeal was filed 54 days after entry of judgment. The issue presented here is whether the 30-day or 60-day deadline applies in a *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, where the Government elects not to proceed with the action and the relator instead conducts the action for the Government.

Four circuits have applied the 60-day deadline in these circumstances. *See Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 300-02 (3d Cir. 2008); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997). Besides the Second Circuit here, only one circuit has applied the 30-day deadline, in a case pre-dating the 1986 amendments to the FCA. *See United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327,

1329 (10th Cir. 1978), *cert. denied,* 444 U.S. 839 (1979).

Petitioner, Respondents, and the Second Circuit all agree that the Government here is, at a minimum, a real party in interest. Indeed, notwithstanding its decision to decline intervention in a *qui tam* action, the Government still owns the claims alleged and is entitled to the bulk of any recovery. The question is what additional condition, if any, must obtain in order for the Government, as a real party in interest, to be a "party" under Rule 4(a)(1)(B).

In Petitioner's view, the only other condition for "party" status is compliance with the requirement, which appears in both the FCA and Federal Rule of Civil Procedure 17(a), that the action be brought "in the name of" the Government – that is, that the Government be identified in the case filings as the party plaintiff. The Third, Seventh, and Ninth Circuits have adopted this view; the Fifth Circuit, though acknowledging such identification, has applied the 60-day deadline to avoid risk of confusion. While the naming requirement is formal, its purpose is important: to ensure that the Government is bound by the judgment in a *qui tam* action and that the defendant is protected from subsequent civil litigation by the Government. Because the Government, as a real party in interest, was named in all filings here as plaintiff and was therefore bound by the judgment, the Government was a "party." The notice of appeal was accordingly timely.

In its decision dismissing the appeal as untimely, the Second Circuit held that a real party in interest, to be a "party," must be "the person participating in the proceedings with control over litigation." (Pet. App. 8a.) The court ruled that, having decided not to proceed with the action, the Government "played no role in this matter before the district court." (Pet. App. 13a.)

The Second Circuit's definition of "party," aside from having no support in the language of the appellate rules and ignoring the naming requirement, relies on uncertain concepts of "participation" and "control," and therefore is not suited to determine a jurisdictional filing deadline. The likelihood of debate about whether the Government did or could participate in and control the declined *qui tam* action renders the Second Circuit's definition an unworkable test for appellate jurisdiction. Furthermore, the Second Circuit's holding failed to acknowledge that, even without intervening, the Government has an array of special rights to participate in and control the *qui tam* action. Accordingly, the judgment of the Second Circuit should be reversed.

B. *Qui Tam* Actions Under the FCA

The FCA imposes civil liability on anyone who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval . . . ." 31 U.S.C. § 3729(a)(1). A person who

violates the FCA is liable to the Government for treble damages and civil penalties. *Id.* § 3729(a). An FCA action may be brought in two ways. The Attorney General may bring an action, *id.* § 3730(a), or, under the FCA's *qui tam* provisions,[3] a private person (known as a "relator"[4]) may bring an action "for the person and for the United States Government." *Id.* § 3730(b)(1). "The [*qui tam*] action shall be brought in the name of the Government." *Id.* The *qui tam* action may not be dismissed without the consent of the Attorney General. *Id.*

The *qui tam* complaint and the relator's material evidence must be served on the Government under Federal Rule of Civil Procedure 4. *Id.* § 3730(b)(2). The complaint is filed under seal for 60 days. *Id.* The Government "may elect to intervene and proceed with the action within the 60 days after it receives both" the complaint and the material evidence. *Id.* Before the 60-day period expires, "the Government shall – (A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4). Once

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[3] *"Qui tam"* is shorthand for the Latin formula "'*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,'" which means "'who pursues this action on our Lord the King's behalf as well as his own.'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000).

[4] *See Stevens*, 529 U.S. at 769.

a *qui tam* action is filed, "no person other than the Government may intervene or bring a related action based on the [same] facts . . . ." *Id.* § 3730(b)(5).

If the Government "proceeds" with the action, "it shall have the primary responsibility for prosecuting the action," though the relator may "continue as a party . . . ." *Id.* § 3730(c)(1). If the Government "elects not to proceed" with the action, "the [relator] shall have the right to conduct the action," but the Government, upon request, must be served with pleadings and deposition transcripts. *Id.* § 3730(c)(3). If the relator "proceeds" with the action, "the court, without limiting the status and rights of the [relator], may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.* Regardless of whether the Government proceeds with the action, "upon a showing by the Government that certain actions of discovery by the [relator] would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days." *Id.* § 3730(c)(4). The Government is entitled to most of the recovery – at least 75% if the Government proceeds with the action, and at least 70% if it does not so proceed – with the balance going to the relator. *Id.* § 3730(d)(1) & (2).

C. Proceedings Below

On January 17, 2003, Petitioner filed a complaint *pro se* in the United States District Court for the Southern District of New York against Respondents alleging claims on behalf of the Government and himself under the FCA's *qui tam* provisions, 31 U.S.C. § 3730(b)(1). Consistent with the FCA and applicable rules, the caption of the complaint named as "Plaintiff" the "United States of America Ex Rel Irwin Eisenstein et al." (JA 23.) *See* 31 U.S.C. § 3730(b)(1);[5] Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest.");[6] *see also* Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties . . . .").

Pursuant to 31 U.S.C. § 3730(b)(4)(B), the Government declined to take over the action. In its "Notice of Election to Decline Intervention," filed in the district court, the Government "refer[red] the Court to 31 U.S.C. § 3730(b)(1), which allows the relators to maintain the action in the name of the United States . . . ." (JA 46-47.) In the Notice, the Government asserted its rights to give written consent for any dismissal or settlement, to be served with all

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[5] *See United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48 (4th Cir. 1992) (because of naming requirement in § 3730(b)(1), plaintiff in case was "'United States ex rel. Kathryn Milam'").

[6] *See, e.g., Milam*, 961 F.2d at 48-50 (in *qui tam* action, Government is real party in interest regardless of whether it intervenes); Point I.A., *infra*.

pleadings, and to intervene in the action for good cause at a later date. (*Id.*) The Government reserved its right to order deposition transcripts. (*Id.*)

On May 29, 2003, Respondents moved to dismiss the complaint for failure to state a claim. In a Memorandum and Order dated March 30, 2006, the district court granted the motion and dismissed the complaint. (Pet. App. 16a-43a.) Judgment was entered on April 12, 2006. (JA 5; Pet. App. 4a.) Petitioner filed a notice of appeal *pro se* on June 5, 2006 – 54 days after entry of judgment. (JA 6, 51; Pet. App. 4a.)[7]

On December 6, 2006, some six months after the notice of appeal was filed, the Second Circuit, on its own motion, questioned the timeliness of the appeal and directed Petitioner to respond. (JA 10.) Prior to that point, no issue of timeliness had been raised by either Respondents or the Government. (JA 9-10.) By order dated December 26, 2006, the Second Circuit directed "the parties and the United States" to brief the issue of whether the 30-day or the 60-day deadline for filing a notice of appeal, *see* Fed. R. App. P. 4(a)(1), applies in a *qui tam* action where the Government has declined to intervene. (JA 56-57.)

On January 25, 2007, Respondents moved to dismiss the appeal for lack of jurisdiction on the ground that the notice of appeal was not timely filed.

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[7] The notice of appeal specifically stated that the Government was a "party." (JA 52.) The Government was served with a copy of the notice of appeal. (JA 53.)

(JA 11; Pet. App. 5a.) Respondents argued that, because the Government declined to intervene in the action, the 30-day deadline under Rule 4(a) applied. (Pet. App. 2a, 5a.)

By order dated March 5, 2007, the Second Circuit *sua sponte* directed the appointment of *pro bono* counsel to Petitioner, only for purposes of the motion, to brief, *inter alia*, the timeliness issue. (JA 59.) The Second Circuit appointed such *pro bono* counsel on May 30, 2007. (JA 60-61; Pet. App. 5a.)

On October 1, 2007, *pro bono* counsel filed an opposition memorandum arguing that, regardless of whether the Government declines to intervene, the Government is a party in all *qui tam* actions and that the plain meaning of Rule 4(a)(1)(B) mandates application of the 60-day deadline. (JA 17.) On November 9, 2007, the Government filed an *amicus* brief in support of Respondents.[8] (JA 18.) In its brief, the Government argued that it is not a party to a *qui tam* action where it has declined to intervene and that the instant notice of appeal, which was filed beyond the

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[8] Previously, the Government took the opposite position, arguing that, even after declination, the Government is a party for purposes of the 60-day deadline and citing *Haycock* with approval. *See infra* at 27 n.17. As far as the six circuit decisions on point reveal, *see supra* at 4, the instant case is the only one of the six in which the Government submitted an *amicus* brief or mentioned any timeliness issue. Only after the Second Circuit directed briefing by the Government did the Government raise the timeliness issue below. (Pet. App. 5a.)

30-day deadline set forth in Rule 4(a)(1)(A), was untimely.

D. The Second Circuit's Decision

On August 19, 2008, the Second Circuit granted Respondents' motion and dismissed the appeal as untimely. The court concluded that, "when the government fails to intervene or to raise or resist any legal claim," it is not a party under Rule 4(a)(1)(B) and that the instant notice of appeal should have been filed within the 30-day period under Rule 4(a)(1)(A). (Pet. App. 7a.) In support of that conclusion, the court held:

> As used in Rule 4(a)(1), the word "party" refers to the person participating in the proceedings with control over litigation. The government, once having declined to intervene at the outset of an action may not participate in it, save for asking that it be served with pleadings and for approving any withdrawal with prejudice, without moving to intervene upon a showing of good cause. The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation.

(Pet. App. 8a.)

Relying on the 1946 Advisory Committee's Notes to Rule 4(a)(1)(B)'s predecessor, the Second Circuit also held that the rationale for applying the 60-day

deadline "is obviously inapplicable to the present case" because "the government has played no role in the underlying litigation . . . ." (Pet. App. 11a.) The Notes state that the Government's slow decision-making processes require more than the usual 30 days in which to appeal, and that, in fairness, other parties should have the same time to appeal in a case where the Government is a party. (Pet. App. 10a-11a (citing discussion of Notes in *Russell,* 193 F.3d at 306).)

The Second Circuit also relied on *Petrofsky.* There, a divided panel of the Tenth Circuit held that, following declination, the Government's participation in a *qui tam* action is "'tangential or nominal,'" and that, since all parties were aware that the Government "'disclaimed any participation in the suit,'" there was no need for more than the usual 30-day filing period. (Pet. App. 15a (quoting *Petrofsky,* 588 F.3d at 1329).)

The Second Circuit acknowledged that "our holding in this matter puts us in conflict with three of the four courts of appeals that have considered the issue."[9] (Pet. App. 13a.) With the recent *Rodriguez* decision, the weight of authority has tilted even further away from the Second Circuit's holding in this case.

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[9] Notwithstanding the present circuit split (which *Rodriguez* has now deepened), the Second Circuit held that "there is little history of confusion" on the issue herein. (Pet. App. 14a.)

SUMMARY OF ARGUMENT

Even in a declined *qui tam* action under the FCA, the Government is a real party in interest. It owns the claims alleged and is entitled to the bulk of any recovery. Moreover, the action is brought on the Government's behalf and may not be settled or voluntarily dismissed without the Government's consent. Insofar as anything more is required to justify application of the 60-day deadline here, the four circuits applying that deadline have given great, even dispositive, weight to the identification of the Government as the plaintiff in the filings and caption of the *qui tam* action. Far from depending on the relator's whim, such identification is mandated by the naming requirement in both the FCA and Federal Rule of Civil Procedure 17(a). That requirement, though formal and simple, critically ensures that the Government is bound by any judgment. Identification of the Government as the plaintiff in the filings and caption – a result of the naming requirement – is the only condition necessary to render the Government, as a real party in interest here, a "party" under Rule 4(a)(1)(B).

Because procedural rules must be read to avoid "traps for the unwary," four of the six circuits to address the issue have held that a literal reading of Rule 4(a)(1) warrants application of the 60-day deadline. A holding by this Court in favor of the 30-day deadline would not eliminate confusion: The identification of the Government, even after declination, as the plaintiff in the filings and caption of a *qui tam*

action would always be a trap for the litigant who reads and relies on the rules to determine the applicable appellate filing deadline. If there has been confusion among circuit panels on this issue, then surely there will be confusion among litigants who apply Rule 4(a)(1) with their case filings and caption in mind. Only a holding in favor of the 60-day deadline will eliminate confusion.

The Second Circuit's holding is fatally flawed. The court's definition of "party," relying on such imprecise concepts as "participation" and "control," is too uncertain to determine a jurisdictional filing deadline. In addition, the court cited no support for this definition and relied on an *ipse dixit*, asserting that an inability to participate in litigation without moving to intervene therein is not consistent with being a party. In the *qui tam* context, the premise of the assertion is mistaken: To protect its continuing interests after declination, the Government has significant rights to participate in and control the *qui tam* action, without ever intervening. Furthermore, the court's decision ignores the Government's participation in and control of the *qui tam* action during the sealing period, in which the Government investigates the relator's allegations before electing to proceed or decline. Nor should intervention be the test of "party" status, because, even without intervening in the *qui tam* action, the Government has rights typically possessed by parties.

The Second Circuit also mistakenly concluded that the rationale for the 60-day deadline – to

accommodate the slow pace of Government decision-making – is inapplicable in a declined *qui tam* action. Demonstrably, the Government may seek to appeal even without intervening; therefore, the rationale is applicable and favors the 60-day deadline. Declination does not necessarily indicate a lack of governmental interest in the merits of *qui tam* claims.

The Tenth Circuit's split decision in *Petrofsky,* on which the Second Circuit relied below, was based on a version of the FCA pre-dating the 1986 amendments. Those amendments and subsequent case law materially increased the Government's rights to participate in and control the *qui tam* action following declination. Except for the Second Circuit's decision here, every circuit to address the issue following the 1986 amendments has applied the 60-day deadline in a declined *qui tam* action.

ARGUMENT

I. Even Where the Relator, Not the Government, Conducts the *Qui Tam* Action, the Government Is a "Party" Because It Is a Real Party in Interest and, by Statute and Rule, Is Identified as the Plaintiff in All Filings

Rule 4(a)(1)(B) provides that, when "the United States . . . is a party, the notice of appeal may be filed by any party within 60 days after" entry of judgment. Where the Government does not proceed with a *qui*

tam action, and the relator instead conducts the action for the Government, the Government is still a "party" under Rule 4(a)(1)(B). As an initial matter, the Government is still a real party in interest. The claims in the case still belong to the Government, and the Government is still entitled to the lion's share of the proceeds. The question is what other condition, if any, must be satisfied in order for the Government, as a real party in interest, to be a "party." Contrary to the Second Circuit's holding that the Government must also "participat[e] in" and "control" the action (Pet. App. 8a), the only other condition that must be satisfied is compliance with the naming requirement of the FCA and Federal Rule of Civil Procedure 17(a). By mandate of statute and rule, all filings in a *qui tam* action, even after the Government's declination, must identify the Government as the party plaintiff. Though formal, the naming requirement performs the essential function of ensuring that the Government is bound by the judgment. Because that requirement was observed here, the Government was a "party." The Second Circuit's judgment should accordingly be reversed.

A. The Government Is a Real Party in Interest, Even After Declination

In a *qui tam* action under the FCA, even after declination, the Government is a real party in interest. Numerous courts have so held, and Respondents so concede. *See Stoner v. Santa Clara County Office of Ed.*, 502 F.3d 1116, 1126 (9th Cir. 2007) (citing *United*

States v. Schimmels (In re Schimmels), 127 F.3d 875, 882 (9th Cir. 1997), and *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992)); *United States ex rel. Mergent Servs. v. Flaherty,* 540 F.3d 89, 93 (2d Cir. 2008); Pet. App. 8a (citing *Stoner*); Respondents' Brief in Opposition, dated December 9, 2008, at 8; *see also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 560 (8th Cir. 2006); *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349, 1359 (11th Cir. 2005); *Russell,* 193 F.3d at 307.

The Government remains a real party in interest because "the underlying claim of fraud *always* belongs to the government." *Stoner*, 502 F.3d at 1126 (emphasis added). Because the relator is effectively the partial assignee of "the *Government's* damages claim," *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 773 & n.4 (2000) (emphasis added), the unassigned portion of that claim maintains the Government's status as a real party in interest. The FCA elsewhere refers to the claim as the Government's, stating that, notwithstanding the *qui tam* provisions, "the Government may pursue *its* claim through any available remedy . . . ." 31 U.S.C. § 3730(c)(5) (emphasis added) (cited in *Stoner,* 502 F.3d at 1126). Furthermore, the relator brings the action for himself "and for the United States Government." 31 U.S.C. § 3730(b)(1) (cited in *Stoner,* 502 F.3d at 1126). Even after declination, the Government is entitled to most of the recovery – at

least 70%, *see* 31 U.S.C. § 3730(d)(1) & (2); *see, e.g., Flaherty,* 540 F.3d at 93 – and the action may not be settled or voluntarily dismissed without the Government's consent, *see United States ex rel. Ridenour v. Kaiser-Hill Co.,* 397 F.3d 925, 931 n.8 (10th Cir. 2005); *United States ex rel. Doyle v. Health Possibilities, P.S.C.,* 207 F.3d 335, 336 (6th Cir. 2000); *Searcy v. Philips Electronics N. Am. Corp.,* 117 F.3d 154, 158-60 (5th Cir. 1997) (rejecting *United States ex rel. Killingsworth v. Northrop Corp.,* 25 F.3d 715, 722-23 (9th Cir. 1994)); *Milam,* 961 F.2d at 49; *see also Rodriguez,* 552 F.3d at 301 (collecting cases).

Furthermore, regardless of intervention, the claims in a *qui tam* action uniquely concern the Government, as the injury at issue is always to the Government's property and sovereignty. *See Stevens,* 529 U.S. at 771. The FCA authorizes recovery for damage caused to the Government. *See* 31 U.S.C. § 3729(a) (imposing liability for "damages which the Government sustains because of [a violation]"). The FCA has been applied to a range of federal programs. *See, e.g., Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 942-43 (1997) (defense procurement); *Cook County, Ill. v. United States ex rel. Chandler,* 538 U.S. 119, 123-24 (2003) (treatment for drug abuse); *Stevens,* 529 U.S. at 770 (environmental protection). Thus, even after declination, the Government's presence in a *qui tam* action is pervasive. *Cf. Russell,* 193 F.3d at 308 ("the government is ever present in *qui tam* suits").

B. The Only Other Requirement for "Party" Status Is Compliance with the Naming Requirement of the FCA and Rule 17(a)

The four circuits applying the 60-day deadline in a declined *qui tam* action all focus on the Government's substantive interest in the case. *See Rodriguez,* 552 F.3d at 301-02; *Lu,* 368 F.3d at 775; *Russell,* 193 F.3d at 307; *Haycock,* 98 F.3d at 1102. However, insofar as that interest is necessary but not sufficient to justify application of the 60-day deadline, these four circuits also focus on a formal factor: that the Government is identified as the plaintiff in the filings of the case.[10] *See Rodriguez,* 552 F.3d at 302 (citing *Lu,* 368 F.3d at 775; *Russell,* 193 F.3d at 307-08; *Haycock,* 98 F.3d at 1102). These courts find such identification weighty, even dispositive. Thus, the *Rodriguez* court held, "We . . . join our colleagues in the Fifth, Seventh and Ninth Circuits in finding significant that, even when it declines to intervene, the United States remains a party to a *qui tam* action in the literal sense, *i.e.,* its name is on the caption." *Rodriguez,* 552 F.3d at 302.

Such identification is not happenstance. It is mandated by the FCA's naming requirement. *See* 31 U.S.C. § 3730(b)(1) ("The [*qui tam*] action shall be brought in the name of the Government."). The Ninth Circuit so held in *Haycock*: "[The Government's] name

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[10] Circuits applying the 60-day deadline also note the need for clarity in rule interpretation, discussed in Point II, *infra*.

is on all papers as the plaintiff, *as it must be under the controlling statute*." 98 F.3d at 1102 (quoting 31 U.S.C. § 3730(b)(1)) (emphasis added). Moreover, the naming requirement applies even after the Government declines to intervene.[11]

The naming requirement is not merely a technical rule of pleading. Rather, by mandating that the Government be identified in case filings as a plaintiff, the requirement performs the important function of ensuring that the Government is bound by the judgment and that the defendant is protected from subsequent civil litigation by the Government following entry of judgment.[12] *See Stoner*, 502 F.3d at 1126 (citing cases). The requirement is no less important because it is formal and easily met.

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[11] Nothing in the FCA suggests that the requirement ceases to apply once the Government declines intervention. Indeed, in the instant case, the Government's notice of declination notes the requirement that the relator will "maintain the action in the name of the United States." (JA 47 (Government's declination notice, citing 31 U.S.C. § 3730(b)(1)).) FCA practice is in accord. *See, e.g., Lu*, 368 F.3d at 773 (caption identifying Government as plaintiff even after declination).

[12] The naming requirement also *protects* the Government. For example, if, after the Government's declination, the relator litigates and wins, the naming requirement ensures that the judgment will award money *to the Government*. If, by contrast, the FCA contained no naming requirement (and neither did Rule 17(a)), and the relator brought the action in his own name and won, then the judgment could award money *solely to the relator*. To obtain its statutory share in that case, the Government, instead of obtaining immediate satisfaction (or at least a judgment on which it could promptly execute), would then have to pursue the relator.

The identification of the Government as the plaintiff in a *qui tam* action, regardless of declination, also results from the naming requirement in Federal Rule of Civil Procedure 17(a), which provides: "An action must be prosecuted in the name of the real party in interest." In applying this requirement, courts routinely hold that the real party in interest must be identified in the pleadings as the plaintiff. *See, e.g.*, *Frommert v. Conkright*, 535 F.3d 111, 120 (2d Cir. 2008) ("Defendants-Appellants are not the parties *prosecuting* this action; that role belongs to Plaintiffs-Appellees. . . . The real party in interest principle . . . directs attention to whether [the] *plaintiff* has a significant interest in the particular action he has instituted, and Rule 17(a) is limited to *plaintiffs*." (brackets, citation, and internal quotation marks omitted) (some emphases added)); *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008) ("Under Rule 17(a) we are concerned only with whether an action can be maintained in the *plaintiff's name* . . . ." (emphasis added)); *Wayne v. Martinez*, 58 Fed. Appx. 685, 2003 WL 186649, at *1 (9th Cir. Jan. 21, 2003) (affirming dismissal under Rule 17(a): "The complaint does not name David Struckman *as a plaintiff*, even though he is identified throughout the pleadings as the real party in interest." (emphasis added)).[13] Moreover, Rule 17(a)'s

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[13] *See also Payne v. McKune*, No. 06-3010-JWL, 2007 WL 1019193, at *2 (D. Kan. Apr. 4, 2007) ("The second amended complaint, which names Ms. Payne, as the administrator of Mr. Brown's estate *as a plaintiff*, solves the real party in interest . . . issue[ ]. . . ." (emphasis added)); *Gatto v. MacMillan*, No. Civ. A.

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naming requirement, like the FCA's, is not simply a rule of pleading nicety. Rather, it similarly ensures that the real party in interest is bound by the judgment in the case and that the defendant is protected from subsequent civil litigation by the real party in interest. *See, e.g., Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 102 (5th Cir. 1989); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1039 (9th Cir. 1986).

Thus, even apart from the fact that Rule 17(a)'s naming requirement is a guide to the meaning of the FCA's similar requirement, Rule 17(a) is an independent source of obligation: If hypothetically the FCA contained no naming requirement, the Government's status as a real party in interest, even in a declined *qui tam* action, would still require that the action be "in the name of" the Government and hence that the Government be identified in the pleadings as the plaintiff.[14]

96-2910, 1996 WL 648859, at *2 (E.D. Pa. Nov. 8, 1996) ("Rule 17(a) is the proper vehicle for seeking to amend a complaint by substituting the real party in interest *as the plaintiff*. . . . [W]hile Gatto strenuously argues that he is bringing this suit on his mother's behalf, Gatto's mother has never requested this court to substitute her *as plaintiff* in this action." (emphasis added)); *Feist v. Consolidated Freightways Corp.*, 100 F. Supp. 2d 273, 275 (E.D. Pa. 1999) (requirement of prosecution in name of real party in interest "is a means to identify the person who possesses the right sought to be enforced."), *aff'd*, 216 F.3d 1075 (3d Cir. 2000) (Table).

[14] That the Government after declination is still a party finds additional support in Federal Rule of Civil Procedure

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In sum, the *qui tam* claims here belong to the Government, which is uniquely and pervasively present in *qui tam* actions, even after declination. Moreover, the Government was identified as the plaintiff in the case's caption and filings, including the complaint, the Government's notice of declination, and the notice of appeal. (JA 23, 46, 51.) Even if a "real party in interest" is not necessarily a "party" for purposes of Rule 4(a)(1)(B), compliance with the naming requirement in section 3730(b)(1) and Rule 17(a) suffices to convert the real party in interest – which in a *qui tam* action is the Government – into a "party" under Rule 4(a)(1)(B), and that requirement was observed in this case.[15] Thus, under the four circuit decisions on point here, and under section

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10(a). Rule 10(a), which provides that the caption of a complaint must have a title, requires that such title "name all the parties . . . ." Fed. R. Civ. P. 10(a). The Third Circuit in *Rodriguez*, though not citing Rule 10, evidently had Rule 10(a)'s requirement in mind when it held that the Government, even after declination, "remains a party to a *qui tam* action in the literal sense, *i.e., its name is on the caption.*" 552 F.3d at 302 (emphasis added).

[15] *See Milam*, 961 F.2d at 48 (holding, for Eleventh Amendment purposes, that Government's status as real party in interest, along with identification of Government as plaintiff in case title pursuant to naming requirement in FCA and Rule 17(a), rendered Government "the real plaintiff"); *see also United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1209-12 (7th Cir. 1995) (holding, for purposes of former *qui tam* provision of 25 U.S.C. § 81, that Government's substantive interest in case, along with identification of Government as plaintiff in case title pursuant to naming requirement in § 81 and Rule 17(a), rendered Government "the real plaintiff").

3730(b)(1) and Rule 17(a), the Government was a "party" for purposes of Rule 4(a)(1)(B). The 60-day rule therefore applied, and the notice of appeal herein was accordingly timely.

II. The Need for Clarity in Rule Interpretation Favors Application of the 60-Day Rule Here

Because the naming requirement mandates identification of the Government as the party plaintiff in the filings and caption, any holding in favor of the 30-day deadline will not eliminate confusion as to the applicable filing deadline. Only a holding in favor of the 60-day deadline will eliminate confusion.

Procedural rules must be interpreted to avoid "traps for the unwary." *Russell,* 193 F.3d at 308. Courts should "avoid any reading likely to cause confusion." *Rodriguez*, 552 F.3d at 302. As the Ninth Circuit held in *Haycock,* what matters more than whether the 30-day or 60-day rule applies is whether "the unsuccessful party in district court [can] figure out which time period applies, easily, without extensive research, and without uncertainty." 98 F.3d at 1102. All four circuit decisions cited above – *Haycock, Rodriguez, Lu,* and *Russell* – have observed that a literal reading of Rule 4(a)(1) militates in favor of applying the 60-day rule. *See Haycock,* 98 F.3d at 1102 ("A literal interpretation of the rule achieves this important purpose."); *Rodriguez,* 552 F.3d at 302 ("Applying the shorter deadline may confuse litigants

who, based on a literal reading [of] Rule 4(a)(1), assume that the longer deadline applies."); *Lu,* 368 F.3d at 775 ("These decisions also note the trap for the unwary that would be created by giving Rule 4(a)(1) a nonliteral interpretation . . . ."); *Russell,* 193 F.3d at 308 ("[W]e are persuaded by the *Haycock* court's view . . . ."). Under these authorities, the 60-day rule should apply here.

Though one might conclude that a holding by this Court in favor of the 30-day rule will be sufficient to dispel confusion, such a conclusion is belied by the fact that the Government must *always* be named as a plaintiff in the caption of a *qui tam* action, even after declination. Thus, confusion will always plague those litigants who read and rely on the rules to determine the applicable filing period. The question is not whether this Court has the ultimate power to declare the law; that power is undisputed. The question, rather, is whether there will be a "trap for the unwary" or a "likel[ihood of] confusion" even following a holding by this Court in favor of the 30-day rule. Because statute and rule require the Government to be identified in the filings and caption as a party plaintiff, the answer to this question is yes. The answer is made emphatic by the fact that confusion on this issue has snared not only *pro se* litigants but counsel as well.[16] Even the current split in the circuits

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[16] The notice of appeal in *Rodriguez* was filed by counsel to the relator. *See* Notice of Appeal, *Rodriguez v. Our Lady of*

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demonstrates a history of confusion at the judiciary's highest levels – with four circuit decisions evidencing the gravitational pull that the literal command of the rules will continue to have in declined *qui tam* actions.[17]

Moreover, the reason for having a code of rules is to minimize the need for research, *see Haycock,* 98 F.3d at 1102, and to provide an authority that "easily" affords a " 'speedy[ ] and inexpensive' " determination of the applicable law, *see Russell,* 193 F.3d at 307-08 (citing Fed. R. Civ. P. 1). Given that a literal reading of the rules militates in favor of the 60-day period, *see, e.g., Haycock,* 98 F.3d at 1102; *Rodriguez,* 552 F.3d at 302; *Lu,* 368 F.3d at 775, an affirmance here would contravene the purpose of the rules. The judgment below should therefore be reversed.

Lourdes Medical Center, 06-cv-0129 (RBK) (D.N.J.) (docket no. 17) (available on Pacer).

[17] It is difficult to overstate the potential for confusion. The Government's role here is *sui generis*; the Third Circuit described the Government's relationship to the *qui tam* action as "neither fish nor fowl," *Rodriguez,* 552 F.3d at 301. Even the Government has taken opposing positions, arguing below that, after declination, the Government is not a party under Fed. R. App. P. 4(a)(1)(B), *see* Brief for the United States of America as *Amicus Curiae* in Support of Defendants-Appellees at 2-3, *United States ex rel. Eisenstein v. City of New York et al.* (2d Cir. 2007) (No. 06-3329-cv), while arguing in *Searcy* that, after declination, the Government "remains 'a party for purposes of the sixty day notice of appeal rule,' " Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1996) (No. 96-40515), 1996 WL 33439979, at *13 (Oct. 25, 1996) (quoting *Haycock*).

III. The Second Circuit Misdefined the Term "Party" and Misunderstood FCA Intervention

A. The Second Circuit's Definition of "Party" Is Incorrect

A misunderstanding of FCA intervention and of the Government's rights absent such intervention led the Second Circuit to define "party" as "the person participating in the proceedings with control over litigation." (Pet. App. 8a.) For several reasons, that definition is incorrect.

First, a "party" – or at least the plaintiff – in a *qui tam* action is the entity that, because of statute and rule, is identified in the filings and caption as the plaintiff, even following declination. *See* Point I, *supra*. This definition, aside from the logic and case law that support it, has the advantage of being easily understood and applied. *See* Point II, *supra*; *Haycock,* 98 F.3d at 1102; *Russell,* 193 F.3d at 307-08; *Rodriguez,* 552 F.3d at 302; *Lu,* 368 F.3d at 775.

Second, and relatedly, the Second Circuit's hazy definition of "party" – relying on concepts of "participation" and "control" – is ill-suited to determine a jurisdictional filing deadline. As the Seventh Circuit stated in *Lu,* a jurisdictional determination should not be based on "uncertain inquiries," such as "what is the named party's *real* interest in the case?," *Lu,* 368 F.3d at 775, or, to recast the question in terms of the holding below, "how much did the named party

participate in and control the litigation?" The Government has any number of powers to participate in and control a *qui tam* action, even after declination. *See infra* at 31. It would be an administrative nightmare for parties and the courts if the existence of appellate jurisdiction depended on factual issues that could arise after declination, such as whether and to what extent the Government sought dismissal of the relator's claims,[18] requested service of pleadings and deposition transcripts,[19] opposed a proposed settlement,[20] and obtained a stay of the relator's discovery.[21]

Further complications arise if the Government intervenes at the end of the district court litigation. Under the participation and control test, it is highly debatable whether the Government, after intervention, meaningfully participated in or controlled such litigation, especially when the relator alone litigated

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[18] *See Ridenour,* 397 F.3d at 932; *Juliano v. Federal Asset Disposition Ass'n,* 736 F. Supp. 348, 351 (D.D.C. 1990) (Government sought dismissal of some, but not all, of defendants named in relator's complaint), *aff'd,* 959 F.2d 1101 (D.C. Cir. 1992) (Table).

[19] *See* 31 U.S.C. § 3730(c)(3); JA 47 (Government's declination notice, which requested service of pleadings but not deposition transcripts).

[20] *See* 31 U.S.C. § 3730(b)(1); *Searcy,* 117 F.3d at 155-56 (Government opposed not amount of settlement but rather wording of release).

[21] *See* 31 U.S.C. § 3730(c)(4); *United States ex rel. McCoy v. California Medical Review, Inc.,* 715 F. Supp. 967, 968 (N.D. Cal. 1989) (describing stays of varying scope).

(perhaps for years) and tried the case. The doubt concerning the significance of the Government's participation and control following late intervention is implicitly recognized by the FCA, which, when the Government after declination seeks to intervene for good cause, permits such late intervention but "without limiting the status and rights of the [relator]." 31 U.S.C. § 3730(c)(3).

Even apart from such factual debate, one must acknowledge that the likelihood of legal debate – *i.e.*, about whether the Government *could,* rather than *did,* participate and control following declination – renders the Second Circuit's definition of "party" too "uncertain" to be a workable test for appellate jurisdiction. *See Helm v. Resolution Trust Corp.,* 18 F.3d 446, 447 (7th Cir. 1994) ("Jurisdictional rules should be as clear *and mechanical* as possible." (emphasis added)).

Third, nothing on the face of the appellate rules authorizes or supports the Second Circuit's definition of the term "party," and the Second Circuit cited no authority therefor. (*See* Pet. App. 8a.) Instead, positing that the Government after declination may not participate in the *qui tam* action without moving to intervene, the Second Circuit simply asserted that "[t]he inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (*Id.*)

The assertion's premise – that, like a private litigant, the Government is unable to participate

without moving to intervene – is erroneous in the *qui tam* context. Even without moving to intervene, the Government, to protect its continuing interests in the case, has numerous rights to participate in and control the declined *qui tam* litigation. *See Rodriguez,* 552 F.3d at 301 ("Even when the Government declines to intervene initially, it still retains the right to continue involvement in the case in various ways."). The action may not be settled or voluntarily dismissed without Government approval. 31 U.S.C. § 3730(b)(1); *Ridenour,* 397 F.3d at 931 n.8; *Doyle,* 207 F.3d at 336; *Searcy,* 117 F.3d at 158-60; *Milam*, 961 F.2d at 49; *Rodriguez,* 552 F.3d at 301; *supra* at 19. The Government may move to dismiss. *Ridenour,* 397 F.3d at 932; *id.* at 933-34 (citing cases). The Government upon request must be served with all pleadings and deposition transcripts. 31 U.S.C. § 3730(c)(3). The Government is entitled to the bulk of the monetary recovery. *Lu,* 368 F.3d at 775; *Rodriguez,* 552 F.3d at 301 (Government entitled to at least 70% of recovery even after declination); 31 U.S.C. § 3730(d)(1) & (2). The Government may obtain a stay of any discovery by the relator that would interfere with the Government's pursuit of claims arising from the same facts. 31 U.S.C. § 3730(c)(4). The judgment will be in the name of, and will bind, the Government. *See, e.g.,* Judgment, *United States ex rel. Harrison v. Westinghouse Savannah River Co.,* CA 1:94-cv-02332-CMC (D.S.C. July 24, 2002) (docket no. 189) (available

on Pacer); *Searcy*, 117 F.3d at 157. By any reasonable definition, these factors evidence "participati[on]" and "control."[22] Indeed, as the Government itself noted below, the Second Circuit previously held that, after declination, the Government "retains significant *control* over the action."[23] *United States ex rel. Stevens v. State of Vermont Agency of Natural Res.*, 162 F.3d 195, 201 (2d Cir. 1998), *rev'd on other grounds*, 529 U.S. 765 (2000) (emphasis added); *see* Brief for the United States of America as *Amicus Curiae* in Support of Defendants-Appellees at 8, *United States ex rel. Eisenstein v. City of New York et al.* (2d Cir. 2007) (No. 06-3329-cv) (citing *Stevens*, 162 F.3d at 201); *see also United States ex rel. Zissler v. Regents of Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998) (referring to

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[22] For this reason, the Second Circuit was inaccurate in asserting that, after declination and without moving to intervene for good cause, the Government may not participate "save for asking that it be served with pleadings and for approving any withdrawal with prejudice." (Pet. App. 8a.) The court simply ignored the Government's rights to seek dismissal, to be served with deposition transcripts, to limit the relator's discovery, to obtain most of the recovery, and to be named in the judgment. *See supra* at 31-32.

[23] The Second Circuit's "control" test for "party" status is also inconsistent with the FCA provisions concerning the relator's status following Government intervention. Once the Government elects to intervene, the Government, not the relator, "conduct[s]" the action, 31 U.S.C. § 3730(b)(4)(A), has "primary responsibility for prosecuting the action," *id.* § 3730(c)(1), and is "not . . . bound" by any act of the relator, *id.* Tellingly, however, the relator continues as a "party." *Id.* Thus, the FCA itself demonstrates that one can be a party without having "control" of the *qui tam* action.

"'the extensive power the government has to control the litigation'" even after declination (quoting *Milam*, 961 F.2d at 49)). Thus, the Second Circuit was mistaken in stating that the Government here was "[unable] to participate without moving to intervene." (Pet. App. 8a.)

Similarly, the Second Circuit's decision fails to acknowledge the Government's participation in and control over the *qui tam* action during the 60-day investigative period between service of the relator's *qui tam* complaint on the Government and the Government's initial election to proceed or decline. *See* 31 U.S.C. § 3730(b)(4)(A) & (B) (during 60-day period, Government must "proceed with the action" or "notify the court that it declines to take over the action"); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 (9th Cir. 1993) (observing that Government uses 60-day period to investigate relator's claims). As a preliminary matter, the FCA requires that the *qui tam* complaint be "served" on the Government under Rule 4 of the Federal Rules of Civil Procedure, *see* 31 U.S.C. § 3730(b)(2) – a requirement demonstrating Congress's view that the Government is a party to the litigation from the outset. The Government may then seek extensions of the decision period. *Id.* § 3730(b)(3). The Government may investigate and gather evidence. *Kelly*, 9 F.3d at 746. No one other than the Government may intervene. 31 U.S.C. § 3730(b)(5). The Government's discretion to decide whether to proceed or to decline is unrestricted. *See id.* § 3730(b)(2) & (4). The Government

may also settle or dismiss the case without the relator's approval. *Swift v. United States,* 318 F.3d 250, 252-53 (D.C. Cir. 2003).[24] Thus, putting aside the post-declination period, the Government participates in and controls proceedings during the 60-day investigative period. *See Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1010-12 (8th Cir. 1984) (holding Government "party" under Fed. R. App. P. 4 because Government had been party in district court, regardless of whether it was party when judgment entered).[25]

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[24] The *Swift* court made two other relevant holdings. First, in support of the conclusion that the Government has an unfettered right to dismiss a *qui tam* action even before its initial election, the court cited Fed. R. Civ. P. 41(a)(1), which permits a "plaintiff" to dismiss a civil action without a court order if the adverse party has not answered or moved for summary judgment. *See* 318 F.3d at 252; Fed. R. Civ. P. 41(a)(1)(A)(i). Clearly, the court considered the Government a "plaintiff" – that is, a party – even though the Government had not yet made its initial election. Second, in discussing the Executive's discretion to decide whether to bring an action on behalf of the Government, the court stated that nothing in 31 U.S.C. § 3730(c)(2)(A) "purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." 318 F.3d at 253. Thus, by not moving to dismiss during the investigative period, the Government makes an affirmative decision to have the *qui tam* action "go forward in the name of the" Government – a clear act of participation and control.

[25] The two circuit courts holding in favor of the 30-day appellate deadline based their holdings on the assertion that "'the government [has] disclaimed any participation in the suit . . . .'" (Pet. App. 15a (quoting *Petrofsky,* 588 F.2d at 1329).)

(Continued on following page)

B. Intervention Should Not Be the Test of "Party" Status

Similarly, intervention itself, as opposed to participation and control, should not be the test of "party" status under Rule 4(a)(1)(B).[26] Intervention under the FCA is manifestly different from intervention otherwise. One who declines to intervene in a non-FCA case has none of the above-described rights of participation and control that the Government, without moving to intervene, has in a declined *qui tam* action. Indeed, one who declines to intervene in a non-FCA case is generally a stranger to the action, unbound by the judgment and unentitled to share in the recovery, to seek dismissal, to be served with pleadings and transcripts, to veto a settlement or dismissal, or to obtain a stay of discovery that interferes with pursuit of the non-intervenor's own claims.

Neither court, however, addressed the 60-day investigative period. Nor did either court acknowledge that, once service is effected upon a person identified in the complaint as a party, the degree of the person's participation is irrelevant to whether the person was a party; a defendant who was served and defaulted was still a party, notwithstanding the default. *See* Fed. R. Civ. P. 55(a) (when "party" fails to plead or otherwise defend, clerk must enter "the party's default").

[26] To be clear, the Second Circuit's holding was that the test for "party" status is not whether the Government has intervened, but rather whether the Government participates in and controls the litigation. (Pet. App. 8a.) In Petitioner's view, the Government, even under the test of participation and control, was a "party" here, for the reasons discussed in the text above.

See generally Martin v. Wilks, 490 U.S. 755, 763 (1989), *superseded by statute on other grounds, see United States v. Andrews*, 146 F.3d 933, 938 n.5 (D.C. Cir. 1998). In an FCA case, by contrast, the Government, without intervening, has all of these powers, which are typically possessed by parties. Thus, in an FCA case, the Government's party-peculiar rights absent intervention make intervention an unsuitable test for "party" status.[27]

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[27] Intervention under the FCA, though not determinative of "party" status under Fed. R. App. P. 4(a)(1)(B), does determine issues of litigation management, such as who may decide the pace and scope of discovery. *Searcy*, 117 F.3d at 160 ("conduct" of action includes executing discovery, as well as devising strategy and arguing in court, but not negotiating settlement). For this reason, the FCA indicates that the Government's decision to intervene *vel non*, *see* 31 U.S.C. § 3730(b)(2), determines who will "conduct" the action, *id.* § 3730(b)(4), and that, in the conduct of the action, principal issues will be "the number of witnesses" to be called, "the length of testimony of such witnesses," "cross-examination of witnesses," *id.* § 3730(c)(2)(C)(i)-(iii), and whether "discovery by the [relator]" will interfere with the Government's pursuit of claims arising from the same facts, *id.* § 3730(c)(4). Nor would a holding that the Government is a "party" under Fed. R. App. P. 4(a)(1)(B) cause the Government, following declination, to be subject to discovery under Fed. R. Civ. P. 26-37. Indeed, in *Searcy*, the Government argued both that it should be treated as a party for purposes of appeal (citing *Haycock*) and that declination barred it from being treated as a party for purposes of discovery. *See* Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1996) (No. 96-40515), 1996 WL 33439979, at *13-14 (Oct. 25, 1996); Reply Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1997) (No. 96-40515), 1997 WL 33562499, at *17-18 (Jan. 2,

(Continued on following page)

C. The Rationale for the 60-Day Deadline Is Applicable Here

In the decision below, the Second Circuit, relying on the 1946 Advisory Committee's Notes to Rule 4(a)(1)(B)'s predecessor, held that the rationale for the 60-day appellate deadline – *i.e.*, the slowness of the Government's decision-making process regarding whether to appeal – is inapplicable in a declined *qui tam* action. (Pet. App. 10a-11a.) This holding is erroneous.

Where procedural rules are clear on their face, advisory committee notes "cannot be allowed to contradict the express language of a Rule . . . ." *United States v. Nahodil,* 36 F.3d 323, 328 (3d Cir. 1994). As the courts in *Rodriguez, Lu, Haycock,* and *Russell* have held, a "literal" reading of Rule 4(a)(1)(B) favors application of the 60-day deadline. *See* Point II, *supra*. Accordingly, these four holdings demonstrate that there is no need to resort to the Advisory Committee's Notes and hence to any discussion of the rationale underlying the 60-day deadline.

In any event, the Second Circuit's holding that the rationale was inapplicable in a declined *qui tam* action is incorrect. The Government in a *qui tam* action may seek to appeal without ever intervening. *See Rodriguez,* 552 F.3d at 302 (citing *Searcy,* 117

1997); *cf. Searcy,* 117 F.3d at 156 ("[V]iewing the government as a party for the purposes of [Fed. R. App. P.] 4(a)(1) does not compel us to treat it as a party for all appellate purposes.").

F.3d at 157). Thus, the *Rodriguez* court explicitly rejected the Second Circuit's rationale-based holding, concluding, "the slowness of the Government continues to be relevant to determining how long the right to appeal should remain available." 552 F.3d at 302.[28]

The Second Circuit's holding appears to have misapprehended the reasons for declination. (*See* Pet. App. 11a (holding rationale for 60-day period "obviously inapplicable to the present case" because "the government has played no role in the underlying litigation").) As numerous courts have held, a declination may be motivated by a variety of issues and does not necessarily indicate a lack of governmental interest in the outcome of the *qui tam* action. *See, e.g., United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455 (5th Cir. 2005) ("The [FCA] . . . does not require the government to proceed

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[28] That the Government may seek to appeal without ever intervening – at least prior to entry of judgment – is also demonstrated in *United States ex rel. McGough v. Covington Technologies, Co.*, 967 F.2d 1391, 1392 (9th Cir. 1992). There, the Government sought to appeal even though it never intervened prior to entry of judgment; rather, after such entry, the Government moved to intervene solely for the purpose of appeal. *Id.* at 1393. The Ninth Circuit reversed the district court's denial of the motion to intervene, holding the motion timely because it was made prior to the expiration of the time for filing a notice of appeal. *Id.* at 1394. The *McGough* court did not address the issue of whether the 30-day or 60-day filing deadline applies, apparently because the Government's motion, made 23 days after entry of judgment, *id.* at 1393, was timely under both deadlines.

if its investigation yields a meritorious claim. Indeed, absent any obligation to the contrary, it may opt out for any number of reasons."); *United States ex rel. Chandler v. Cook County, Ill.*, 277 F.3d 969, 974 n.5 (7th Cir. 2002) (noting that declination is not "a commentary on [the] merits" and that Government may have "myriad reasons" for declining, "including limited prosecutorial resources and confidence in the relator's attorney"), *aff'd*, 538 U.S. 119 (2003); *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1458 (4th Cir. 1997) (holding that declination resulted from cost-benefit analysis and was not admission that Government suffered no injury).

D. The Second Circuit's Reliance on *Petrofsky* Was Misplaced

Petrofsky, on which the decision below relied (*see* Pet. App. 15a), provides little support for the Second Circuit's holding.

In the first place, the *Petrofsky* court was sharply divided. The dissent foreshadowed the repeated circuit holdings that a literal reading of applicable law militates in favor of the 60-day rule: "The harm in applying a 30-day requirement is that an appeal is denied because [a litigant] read the statute *literally*. . . ." 588 F.2d at 1329 (Logan, J., dissenting) (emphasis added). The dissent also adumbrated the holding that jurisdictional determinations should not be based on "uncertain inquiries," *Lu*, 368 F.3d

at 775: "I am not anxious to add to our caseload, but believe that the narrow reading 'introduces an element of *uncertainty* in the very critical, because regarded as jurisdictional, area of the time for appeal, and it ought not find favor.'" 588 F.2d at 1329 (Logan, J., dissenting) (emphasis added) (citation omitted).[29]

Furthermore, *Petrofsky* was based on the pre-1986 version of the FCA. *See Searcy,* 117 F.3d at 156. When *Petrofsky* was decided, the FCA authorized significantly less Government participation post-declination than has been the case since the 1986 amendments to the FCA. In the 1986 amendments, Congress added the provisions that, following declination, the Government upon request is entitled to service of pleadings and deposition transcripts and may later intervene for good cause. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, §§ 3-4, 100 Stat. 3153. Nor, at the time of *Petrofsky*, had any

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[29] The dissent, *see* 588 F.2d at 1329, also relied on Judge Friendly's rationale for a broad reading of the predecessor to Fed. R. App. P. 4(a)(1)(B): "It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language. . . . The stated criterion [in the rule] is whether the United States is a party to the action, a test clearly satisfied here, and not whether the United States is concerned with the particular order sought to be appealed – something that often cannot be accurately determined when the order is made." *United States v. American Society of Composers, Authors and Publishers,* 331 F.2d 117, 119 (2d Cir.), *cert. denied,* 377 U.S. 997 (1964).

court yet decided that, after declination, the Government can seek dismissal of the *qui tam* complaint. *See Ridenour*, 397 F.3d at 933-34 (citing cases). Thus, when *Petrofsky* issued, some of the Government's statutory controls did not yet exist, and case law recognizing certain controls was less developed. At best, *Petrofsky*'s vitality is open to question.[30]

In its decision below, the Second Circuit did not acknowledge that *Petrofsky* was based on a version of the FCA different from that which has existed since 1986. In any event, except for the Second Circuit here, every circuit to address the issue since the 1986 amendments has applied the 60-day deadline in a declined *qui tam* action.

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[30] In an unpublished decision, *Shaw v. AAA Eng'g & Drafting Inc.*, 138 Fed. Appx. 62, 75 (10th Cir. 2005), the Tenth Circuit acknowledged both that *Petrofsky* was based on an old version of the statute and that "there are valid arguments in favor of applying the sixty-day rule." *Id.* Nonetheless, failing to see how the FCA's subsequent amendments are relevant to the filing deadline issue, the court concluded, tepidly, that it was still bound by *Petrofsky*. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 25, 2009

RESPONDENT'S BRIEF

No. 08-660

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK, MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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28 U.S.C. § 2107(a):

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(b):

> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

STATEMENT OF THE CASE

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit.

A. INTRODUCTION

A notice of appeal must generally be filed within thirty days after entry of a judgment. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). There is an exception to this rule: where the United States is a party, the time as to all parties is sixty days. 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B).

In this case, Petitioner filed his notice of appeal fifty-four days after entry of judgment. The issue presented to this Court is whether the United States (the "Government") is a "party" to an action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, for purposes of determining the relator's time to appeal, where the Government has declined to intervene and has not participated in the action.

Here, the Second Circuit held that the need to intervene is inconsistent with the characteristics of a party to litigation. In so holding, the Second Circuit joined the Tenth Circuit (*United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1978), *cert. denied*, 444 U.S. 839 (1979)) in holding that where the Government has not intervened in the action and has not exercised any of its rights granted under the FCA, the Government's name in the caption is a mere statutory formality which does not make the Government a party. Therefore, these courts hold, the thirty-day limit applies.

The Third, Fifth, Seventh and Ninth Circuits have held that the Government is a party to every FCA action brought by any relator, without regard to whether the Government has intervened or otherwise participated in the action. Those Courts hold that the sixty day limit applies because it avoids confusion. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297 (3d Cir. 2008); *United States ex rel. Lu v. Ou*, 368 F.3d 773 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997).

There is no dispute here that both the Government and the relator are real parties in interest in a suit under the FCA, whether the Government intervenes and conducts the action, or declines intervention and the relator conducts the action. That term of art, "real party in interest," must be distinguished from the identity of a "party" for purposes of determining the relator's time to appeal. Indeed, in this case, there were three separate claims alleged in the complaint to which the Government was clearly not a party. Pet. App. 16a – 43a.[1]

The definition of "party" is a flexible one. The Government may be a "party" to an FCA action for some purposes and not for others. Where, though, as here, the Government has declined to intervene, all parties are aware of the Government's decision, the Government has taken no other action or filed any other papers with respect to Petitioner's FCA action, and the Government had no right, absent intervention, to appeal from the district court's judgment dismissing the complaint for failure to state a claim, the Government is not a party for purposes of determining the relator's time to take an appeal.

Where the Government is not a party, a notice of appeal must be filed within thirty days of the entry of judgment. The notice of appeal in this case, filed fifty-four days after entry of judgment, was untimely. As a result, the Second Circuit correctly determined that it lacked jurisdiction to hear Petitioner's appeal.

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1. "Pet. App." refers to Petitioner's Appendix filed in this Court with the petition for a writ of certiorari.

The Circuit Court decisions on which Petitioner relies applied the sixty-day exception to the generally applicable thirty-day rule under the guise of a "literal interpretation" of the Rule. Their interpretation is no more "literal" than is that of the Second and Tenth Circuits' interpretation that the thirty-day rule applies. Moreover, those courts failed to recognize that where, as here, the Government is an involuntary party to an action which it did not commence and in which it has not participated, there is no reason to hold that the Government is a party for purposes of determining the relator's time to appeal from a judgment dismissing all four claims alleged in his complaint.

Indeed, the Fifth Circuit has recognized that the Government is not necessarily a "party" for all purposes. *Searcy v. Phillips Electronics North America Corp.*, 117 F.3d 154, 156 (5th Cir. 1997). However, that court erred in *Russell* when it held that the Government is always a party for purposes of determining a relator's time to appeal in an FCA action.

The only reason that there is any confusion on this score is because some Circuit Courts have been sympathetic to litigants and their attorneys who missed the filing deadline and have held, incorrectly, that the Government is always a party to an action under the FCA for purposes of determining the relator's time to appeal. The confusion ends once this Court affirms the Second Circuit's decision and determines that where the Government has taken no action other than to decline to participate in an FCA action, the Government is not a party for purposes of determining the relator's time to appeal.

B. *QUI TAM* ACTIONS UNDER THE FCA

A person who submits a "false or fraudulent claim for payment or approval" to the Government is liable for treble damages and a civil penalty. 31 U.S.C. § 3729(a)(1). Under 31 U.S.C. § 3730(a), the Attorney General may bring a civil action to recover on a false claim. Alternatively, a private person may bring a civil action "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1).

The statute goes on to provide that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.* The consent of the Attorney General is not required for court-ordered dismissal. *Minotti v. Lensink*, 895 F.2d 100, 103-104 (2d Cir. 1990).[2]

After the private person commences an FCA action by filing a complaint under seal, 31 U.S.C. § 3730(b)(2), the complaint and any material evidence which the person possesses must be served on the Government. Within sixty days (plus any extensions) after service, the Government must decide whether it intends to proceed with the action. 31 U.S.C. § 3730(b)(4).

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2. Despite Petitioner's assertion to the contrary, Pet. Brief at 7, one court has held that the Attorney General's consent is also not required for a voluntary dismissal where the Government has declined intervention. *Compare United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994) ("the consent provision contained in § 3730(b)(1) applies only during the initial sixty-day (or extended) period") *with Searcy*, 117 F.3d at 157 (FCA grants the Government "the power to withhold consent to voluntary settlements.").

If the Government elects to proceed with the action, "the action shall be conducted by the Government." 31 U.S.C. § 3730(b)(4)(A). If the Government "declines to take over the action, . . . the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B).

If the Government conducts the action, the person who brought the action has "the right to continue as a party to the action," subject to certain limitations. 31 U.S.C. § 3730(c)(1). If the Government elects not to proceed with the action, its later intervention will only be allowed by the court "upon a showing of good cause." 31 U.S.C. § 3730(c)3) Furthermore, even if such later intervention is permitted, the status and rights of the person initiating the action may not be limited. *Id.*

If the Government declines to take over the action, then, unlike a party to an action, it is only entitled to receive copies of pleadings upon special request. *Compare* Fed. R. Civ. P. 5(a)(1)(B) (pleadings filed after the original complaint "must be served on every party") *with* 31 U.S.C. § 3730(c)(3) ("[i]f the Government so requests, it shall be served with copies of all pleadings filed. . . .").

Of course, the Government is entitled to most of the recovery in an FCA action. This result, however, is not sufficient to confer party status on the Government in an FCA action in which it has neither intervened nor participated in any way.

C. PROCEDURAL HISTORY

Petitioner commenced this action *pro se*, alleging four separate claims, only one of which concerned the FCA. (JA[3] 38) Although it is not entirely clear, the Circuit Court described Petitioner's FCA claim against Respondents as follows:

> Eisenstein contends that because non-resident employees are able to deduct this fee as an expense for federal income tax purposes, their taxable income is less than it might otherwise be, and in this way, the City is depriving the federal government of tax revenue.

Pet. App. 3a.

As required by 31 U.S.C. § 3730(b)(2), petitioner filed his complaint with the United States District Court for the Southern District of New York *in camera* and served it upon the United States Government. The Government, pursuant to 31 U.S.C. § 3730(b)(4)(B), timely notified the district court that it declined to intervene in the action. The Government's notice indicates that copies were sent to each of the plaintiffs named in the complaint. (JA 46-48).

The district court entered an order unsealing the complaint and directing its service upon Respondents. (JA 49-50) Thereafter, petitioner served a copy of the complaint upon Respondents and exercised his right to conduct the action pursuant to 31 U.S.C. § 3730(c)(3).

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3. "JA" refers to the Joint Appendix filed in this Court.

The District Court dismissed the complaint for failure to state any claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). (Pet. App. 16a–43a) Fifty-four days after entry of judgment, petitioner filed a notice of appeal.

The United States Court of Appeals for the Second Circuit, in a *sua sponte* Order dated December 26, 2006, directed the parties and the Government to brief the question whether petitioner timely filed his notice of appeal. (Pet. App. 4a-5a) Specifically, the Circuit Court requested briefing on whether the thirty day time limit in Fed. R. App. P. 4(a)(1)(A) for filing a notice of appeal, or the sixty day time limit in Rule 4(a)(1)(B), applicable where the Government is a party, applies in an action under the FCA where the Government has declined to intervene or take any other action.

Respondents submitted their Brief advocating the thirty-day limit. Respondents based their motion on the additional ground that a non-attorney litigant may not prosecute an FCA action *pro se*.[4] The Government submitted a Brief as *amicus curiae* which also advocated the 30-day time limit. The Circuit Court appointed *pro*

4. The court did not reach this issue. In the event that this Court were to reverse the Second Circuit on the issue raised here by Petitioner, the Second Circuit would likely affirm the District Court's dismissal on the separate ground that a non-attorney litigant may not prosecute an FCA action *pro se*. (Pet. App. 3a n.1) *See United States ex rel. Mergent Services v. Flaherty*, 540 F.3d 89 (2d Cir. 2008). *See also Lu v. Ou*, 368 F.3d at 775-776. If the Government is a party, and it has not appeared by its own attorney, then it must be represented by the relator, because there is no one else in the action except the defendant.

bono counsel to represent Petitioner solely for the purpose of briefing the two issues raised by the motion.

Petitioner *pro se* and Respondents also submitted briefs on the merits of the appeal. At no time did the Government move to intervene, nor did the Government submit any papers other than the Brief requested by the Circuit Court and the Government's Notice of Election to Decline Intervention. (Pet. App. 5a)

D. THE ORDER OF THE CIRCUIT COURT OF APPEALS

In a unanimous opinion issued on August 19, 2008 (Pet. App. 1a), the Second Circuit dismissed the appeal as untimely. *United States ex rel. Irwin Eisenstein v. City of New York*, 540 F.3d 94 (2nd Cir. 2008). The court held that, in an action under the FCA in which the United States has declined to intervene or take any other action, the United States is not a party for purposes of Fed. R. App. P. 4(a)(1) and, therefore, the thirty day time limit for filing a notice of appeal applies. (Pet. App. 2a)

The court held that "[a]s used in Rule 4(a)(1), the word 'party' refers to the person participating in the proceedings with control over litigation." (Pet. App. 8a) Therefore, the Court concluded, the Government's status as the real party in interest in an FCA suit did not make the Government a "party" where the Government has declined to intervene and played no role in the court proceedings.

The court wrote that the term "real party in interest" "is a term of art used in the rules of procedure,"

referring to Fed. R. Civ. P. 17(a)(1), which requires that actions be brought in the name of the "real party in interest". (Pet. App. 10a) The Court concluded that "[w]e therefore regard the omission of 'real party in interest' from [Fed. R. App. P.] Rule [4](a)(1)(B) as meaningful." *Id.*

Where the Government has not intervened in an FCA suit, the relator has the exclusive right to conduct the action. 31 U.S.C. §§ 3730(b)(4)(B), (b)(5) and (c)(3). The Government may subsequently intervene only upon a showing of good cause. 31 U.S.C. § 3730(c)(3). As the Second Circuit wrote, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Pet. App. 8a)

The court also noted, with reference to the Advisory Committee's Notes of 1946 to former Rule 73(a) of the Fed. R. Civ. P., that the intent underlying Rule 4(a)(1)(B) is to account for the "slow machinery of government." (Pet. App. 10a) The Court held that "this rationale is obviously inapplicable to the present case, where the Government has played no part in the underlying litigation other than to decline to participate in it." (Pet. App. 11a) Therefore, the Second Circuit correctly held, it lacked jurisdiction because Petitioner's notice of appeal, filed fifty-four days after entry of judgment, was untimely.

The Second Circuit agreed with the Tenth Circuit that the naming of the Government as a plaintiff "was merely a statutory formality," citing *Petrofsky*, 588 F.2d at 1329. (Pet. App. 15a) The court held that where, as

here, all parties are aware that the Government had declined to intervene, there is no need to allow more than the standard thirty days to take an appeal. (*Id.*)

This Court should affirm the Second Circuit's judgment and hold that the Government is not a party to an FCA action in which it has neither intervened nor taken any other action.

SUMMARY OF ARGUMENT

The parties do not dispute that under the FCA, the Government, together with the relator, are both real parties in interest. However, a real party in interest is not the same as a "party" for purposes of determining the relator's time to appeal from a judgment in an FCA action in which the Government has declined to intervene.

The Government may be a party for one purpose but not for another. The Government is not a party for purposes of determining a relator's time to appeal from a judgment in an FCA action dismissing the complaint for failure to state a claim where the Government has not intervened. Indeed, absent intervention, the Government has no right to appeal from the judgment in this case.

The rationale underlying Fed. R. App. P. 4(a)(1)(B), which grants the Government sixty days to take an appeal, is to allow for the slower-moving machinery of Government. The drafters of the rule believed that fairness dictated granting all parties the same sixty days. Here, where the Government had not right to appeal, the rule, and its reason, are not implicated.

Under the FCA, absent intervention, the Government's role is limited. In contrast to the rights granted to a party by the Federal Rules of Civil Procedure, the Government is not entitled to copies of pleadings after the initial complaint, except upon special request. The Government may not participate in discovery, except to receive copies of deposition transcripts and then, only upon request. The Government has no right at all to be served with discovery papers, written motions or most other notices. The Government may not withdraw or settle an action over a relator's objection, except after a hearing at which the relator may be heard.

The Government may not intervene in an FCA action after the initial period except upon a showing of "good cause." Holding that the Government is a party to an FCA action where it has not intervened would eliminate the statutory requirement that it show "good cause" prior to intervening, and would bestow rights and obligations upon the Government which are not otherwise provided for by the FCA. The requirement that the Government show "good cause" in order to intervene and conduct the action is not consistent with the rights of a party to litigation.

The relator's status as a party is derived from his standing as a partial assignee of the Government's claim. In a case where the Government has not intervened, dismissing the relator from the case ends the action. If the Government were a party, then it would necessarily have the right to continue the action, even without intervention. Nothing in the FCA would permit the Government to take over the action absent its intervention, either initially, or later for good cause shown.

Those circuit courts which have held that the Government is a party for purposes of determining a relator's time to appeal under Fed. R. App. P. 4(a)(1) – a jurisdiction-conferring rule – have incorrectly based their decisions on the convenience of the litigants, rather than upon the limited role that the Government plays in an FCA action in which it has not intervened. This is not a proper basis on which to decide federal appellate court jurisdiction.

The Second Circuit correctly held that it lacked jurisdiction to hear this appeal because the appeal was not taken timely.

ARGUMENT

WHERE THE GOVERNMENT HAS NEITHER INTERVENED NOR OTHERWISE PARTICIPATED IN A FALSE CLAIMS ACT SUIT, THE GOVERNMENT IS NOT A PARTY FOR PURPOSES OF FED. R. APP. P. 4(a)(1).

Whether any party to an action has thirty or sixty days to file a notice of appeal from a judgment depends upon whether the Government is a "party" for purposes of Fed. R. App. P. 4(a)(1). "The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). Here, as the Second Circuit held, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Pet. App. 8a)

A. The Government, Though A Real Party In Interest, Is Not A Party For Purposes Of This Appeal

This Court has not specifically addressed whether the United States is a party to an action under the False Claims Act for purposes of determining whether the thirty day or the sixty day rule of Fed. R. App. P. 4(a)(1) applies. However, this Court's holding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), is instructive.

In *Stevens*, this Court was presented with the question "whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ 3729-3733." 529 U.S. at 768. But, before the Court could reach the main question, it first addressed whether the private individual had standing under U.S. Const. art. III to maintain the action at all where the Government had declined to intervene. The Court answered this threshold question in the affirmative, finding that the private individual was a partial assignee of the Government's claim.

The *Stevens* Court held:

> We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. [footnote omitted] Although we have

> never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits . . . – and also suits by subrogees, who have been described as "equitable assignees." . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

529 U.S. at 773-774 (citations omitted)

The decision in *Stevens* distinguishes between a "party" (who must have art. III standing to maintain a suit) and a "real party in interest," such as the Government, who may not even have appeared in the action. Had the Government been a party plaintiff to the litigation in *Stevens*, then there would clearly have been standing because the alleged injury in fact was indisputably sustained by the Government. 529 U.S. at 774 ("We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.").

The *Stevens* case would have been over if the Court had dismissed the relator. This fact alone demonstrates that the Government is not a party where it has neither intervened nor taken any other action in an FCA case.

Indeed, in *Stevens*, this Court noted that " the Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party.*'" 529 U.S. at 771-772 (citations omitted) (emphasis in original). Where, as here, the Government has not intervened and taken control of the suit, and a dismissal

of the relator would end the action, the only "party" in the action must be the relator, *i.e.*, the "complaining party." Because the Government is not a party, then a litigant has thirty, not sixty, days to file a notice of appeal.[5]

Under the FCA, a relator, as assignee, "effectively stands in the shoes of the government." *United States ex rel. Kelly v. The Boeing Company*, 9 F.3d 743, 748 (9th Cir. 1993). The relator may stand in the shoes of the Government, but the relator is not the Government. *See Hughes Aircraft Company v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)("*qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.")

This Court's holding in *Stevens* undermines one of the rationales of the Seventh Circuit's holding in *Ou*, 368 F.3d 773. In *Ou*, as the Second Circuit noted in its decision here on review, "the Seventh Circuit appears to have concluded that the United States must be a party to FCA actions because relators by themselves lack standing to sue. *Ou*, 368 F.3d at 775." (Pet. App. 14a) *Stevens* holds that relators do have standing to sue.

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5. In *Stevens*, this Court declined to express an opinion as to whether the FCA violates the Appointments Clause or the "take Care" Clause of Const. art. II, §§ 2 and 3, respectively. 529 U.S. at 778 n.8. Holding that the Government is an involuntary party to an action which it did not commence and in which it has not participated may cross the threshold of a constitutional violation.

Furthermore, the Fifth, Seventh and Ninth Circuits incorrectly equated the Government's status as the real party in interest in a False Claims Act action to status as a party for purposes of the Federal Rules of Appellate Procedure – even where the Government has neither intervened nor even appeared in the action. However, those Courts did not have the benefit of this Court's holding in *Stevens*. The standing analysis employed by this Court and the conclusion reached in *Stevens* demonstrate that the Government is not a party in an FCA action until it intervenes or takes some other affirmative steps. Even then, the Government is only a "party" for the limited purpose for which it appeared. *See also Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. __, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008) (assignee of claim has standing in federal court without naming assignor, even where assignee will pay over proceeds of litigation to assignor).

B. The Government Is Only A "Party" For the Limited Purpose For Which It Has Appeared In The Action

In *Martino v. Ortiz*, 484 U.S. 301, 304 (2002), this Court held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Here, the Government had no right to appeal the district court's dismissal of the complaint without first being granted leave to intervene. Consequently, at least for purposes of Rule 4(a)(1), in this case the Government is not a party.[6]

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6. Of course, if the Government's motion to intervene had been made and denied, then it may appeal from that adverse determination. *McGough v. Covington Technologies Co.*, 967 F.2d 1391 (9th Cir. 1992).

Prior to the 1986 amendments to the FCA, once the Government declined to take over the action, it had no further right to enter the action. In enacting the 1986 amendments, Congress intended to grant the Government only a limited right to come into the action after the initial sixty day period, and delegated to the courts a gatekeeper function with respect to the Government's later intervention. The Senate Report for the 1986 amendments states:

> Under current law, the Government is barred from reentering the litigation once it has declined to intervene during this initial period. The Committee recognizes that this limited opportunity for Government involvement could in some cases work to the detriment of the Government's interests. Conceivably, new evidence discovered after the first 60 days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the *qui tam* relator to litigate alone. In those situations where new and significant evidence is found and the Government can show "good cause for intervening, paragraph (2) provides that the court may allow the Government to take over the suit.

Senate Report (Judiciary Committee) No. 99-345 at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

The Court need not determine here what constitutes "good cause" for purposes of allowing the Government's intervention in an FCA action. It is clear that Congress intended to make the courts the gatekeeper for the Government's intervention, and provided a standard by which the Government's motion to intervene must be measured.

The existence of this standard distinguishes this case from the facts in *Devlin*, 536 U.S. 1. In *Devlin*, a class action, the Court held that nonnamed class members were "parties" for the limited purpose of taking an appeal from the approval of a settlement to which they objected at a fairness hearing. In rejecting the Government's proposal that nonnamed class members be required to seek intervention prior to taking an appeal, the Court took note of "the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal . . .." 536 U.S. at 12. The Court held that no purpose would be served by requiring intervention. Here, by contrast, Congress intended that the Government only have a limited ability to participate in the action after an initial declination, and set a standard for the courts to apply if the Government were to seek leave to come into the action later.

Additionally, in *Devlin*, the Court was concerned with the fact that the petitioner in that case had no ability to opt out of the settlement. *Id.* at 10-11. Here, unlike the situation in *Devlin*, the FCA expressly grants certain rights to the Government in connection with a settlement which allow the Government to protect its own interests without intervening. Section 3730(b)(1) provides, in

relevant part, that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Moreover, 31 U.S.C. § 3730(c)(2)(A) allows the Government to dismiss the action over a relator's objection on notice to the relator and grants the relator a right to a hearing. Section 3730(c)(2)(B) provides that "[t]he Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." All of these rights distinguish the Government in an FCA case from the unnamed class members in *Devlin*.

To be sure, Respondents do not contend that the Government can never be a party absent intervention. The question whether the Government is a party for purposes of an appeal if, *e.g.*, its motion to dismiss pursuant to 31 U.S.C. § 3730(c)(2)(A) is denied, is not before this Court. Our position here is that, on the facts of this case, the Government is not a party for purposes of determining Petitioner's time to appeal from the judgment dismissing all four of Petitioner's claims for relief.[7]

Significantly, the Fifth Circuit has held that the Government has no right to appeal where it had not intervened in an FCA action. *Searcy*, 117 F.3d 154 In *Searcy*, the Court wrote:

> In short, the [FCA's] structure distinguishes between cases in which the United States is

7. The Government is clearly not a party to the three of Petitioner's four claims which do not concern the FCA.

> an active participant and cases in which the United States is a passive beneficiary of the relator's efforts. When the government chooses to remain passive, as it has here, we see no reason to treat it as a party with standing to challenge the district court's action as of right.

117 F.3d at 156. In *Searcy*, the court held only that the Government, without intervening, may appeal from an order which overruled its statutory right to veto a settlement.[8]

The Fifth Circuit sought to distinguish its holding in *Searcy* from the Ninth Circuit's decision in *Haycock* (holding that the Government is a party for purposes of Fed. R. App. P. 4(a)(1)) by writing that "viewing the government as a party for the purposes of Rule 4(a)(1) does not compel us to treat it as a party for all appellate purposes." 117 F.3d at 156. *Searcy* cannot reasonably be reconciled with the Fifth Circuit's later decision in *Russell*, 193 F.3d 304, in which the court allowed a relator sixty days to file an appeal.

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8. To the extent that the *Rodriguez* court read *Searcy* to hold that the Government can appeal, without intervening, from any determination adverse to the relator, the *Rodriguez* court has read *Searcy* too broadly. *Compare Searcy*, 117 F.3d at 155-156 (Government, without intervening, objected to settlement; the district court overruled the objection; without intervening, the Government appealed from district court's final order approving the settlement) *with Rodriguez*, 522 F.3d at 302 (citing *Searcy* for the proposition that "the Government can appeal an adverse decision even without formally intervening. . . .").

In *Russell*, the Fifth Circuit held that the Government *is* a party for purposes of Fed. R. App. P. 4(a)(1), even though, according to *Searcy*, the Government has no right to appeal from a judgment in an FCA action in which it has not intervened. The Fifth Circuit did not disavow its prior holding in *Searcy*; instead, the Court merely repeated its language from *Searcy* that it was not required to treat the Government as a party for all appellate purposes. 193 F.3d at 307 n.1. The Court did not explain why the Government might need sixty days to decide whether to appeal where, according to the court, the Government had no right to appeal in the first instance.[9]

Less than two months before its decision in *Russell*, however, the Fifth Circuit had dismissed an appeal from a civil contempt order by a defendant in a case in which the United States was the named party because the defendant-appellant filed his notice of appeal more than thirty days after entry of the district court's order. *United States v. Brumfield*, 188 F.3d 303, 306. (5th Cir. 1999). Citing *United States v. Hallahan*, 768 F.2d 754, 756 (6th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986), the Fifth Circuit wrote in *Brumfield*, "This is not a situation in which the United States' participation in [a] contempt holding is in the traditional posture required for that sixty day provision [in Fed. R. App. P. 4(a)(1)(B)] to apply." *See also United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279, 291 (5th Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000)("even though the United

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9. The *Russell* Court expressly declined to "join the debate over a relator's standing under Article III," 193 F.3d at 307, a debate which this Court resolved in *Stevens*.

States may be a relevant 'party' in this suit for some purposes of the litigation, the Federal Government certainly is not the acting party-of-record in this suit.").

The Second Circuit's reasoning in this case – that participation and control are indicia of party status – and our position that the Government can be a party for one purpose and not for another – are in line with the Fifth Circuit's holdings in *Brumfield* and *Searcy*. *Russell* is the outlier case in the Fifth Circuit.

The Ninth Circuit's reliance in *Haycock*, 98 F.3d 1100, on cases brought under the Miller Act is misplaced. The Government is a real party, not just a party in interest, under the Miller Act, 40 U.S.C. § 270(a). *United States Fidelity and* Guaranty *Co. v. United States for the Benefit of Kenyon*, 204 U.S. 349, 359 (1907)(United States is real litigant, not a mere nominal party, in cases under the statutory predecessor to the Miller Act).

The only way to harmonize the holdings of those courts which have applied the sixty-day rule to a relator's time to appeal in an FCA action is to find, as did the Third Circuit, that "applying the shorter deadline may confuse litigants who, based on a literal reading of Rule 4(a)(1), assume that the longer deadline applies." *Rodriguez*, 552 F.2d at 302. While the intent of those courts is admirable, it is not a sound basis upon which to interpret a jurisdictional rule like Fed. R. App. P. 4(a)(1).

The Second Circuit correctly rejected the faulty reasoning employed by those circuit courts which applied the sixty-day rule. Followed to its illogical

conclusion, those courts opting for the sixty-day rule would hold that, whenever a court was confronted with a choice of two or more potentially applicable limitations, the court should choose the longer limitation because only in that way would a litigant be able to "to figure out which time period applies, easily, without extensive research, and without uncertainty." *Haycock*, 98 F.3d at 1102. While such a resolution is certainly expedient, it is not a principled basis on which to interpret a statute. Federal court jurisdiction should not be based upon the convenience of the litigants.

The hardship, if any, imposed by applying the thirty-day rule in this case is self-imposed. As the Second Circuit aptly noted, "any reasonable counsel would allay these concerns by sensibly filing a notice of appeal within 30 days." As this Court has observed, "filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v. Locke*, 471 U.S. 84, 101 (1985).

Rule 4(a)(1) is a jurisdictional rule. The jurisdiction of the courts of appeals is fixed by Congress, and "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles v. Russell*, 551 U.S. 205, __, 127 S. Ct. 2360, 2363, 168 L. Ed. 2d 96, 102 (2007), citing *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). As such, the jurisdiction of the circuit courts must be limited to the precise

boundaries defined by Congress. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971).[10]

The Second Circuit held that the inclusion of the term of art "real party in interest" in Fed. R. Civ. P. 17(a)(1) and its omission from Fed. R. App. P. 4(a)(1)(B) was deliberate and "meaningful." (Pet. App. 10a) Thus, a proper interpretation of the Rules in this case is that absent intervention or some other affirmative act by the Government, the Government, although a real party in interest in a False Claims Act action, is not a "party" for purposes of determining the Petitioner's time for filing a notice of appeal from a judgment dismissing all four claims alleged in Petitioner's complaint.

Additionally, as the *Russell* court noted,

> The Advisory Committee's Notes of 1946 to Rule 73(a) of the Federal Rules of Civil Procedure, the predecessor of Rule 4(a), explains that the government's institutional decisionmaking practices require more time to decide whether to appeal and that in fairness, the same time should be extended to other parties in a case in which the government is a party. *See* Moore's Federal Practice § 304.11[2], at 304-24 (3d ed. 1997).

193 F.3d at 306. As the Second Circuit held, "this rationale is obviously inapplicable to the present case,

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10. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

where the government has played no role other than to decline to participate in it." (Pet. App. 11a) This rationale is also inapplicable because the Government had no right to appeal from the judgment dismissing Petitioner's complaint for failure to state a claim.

Here, there is a generally applicable thirty-day time period in which to file an appeal, and an exception to that rule for actions in which the Government is a party. "Exceptions from a general policy which a law embodies should be strictly construed." *Spokane & Inland Empire R.R. Co. v. United States*, 241 U.S. 344 (1916).

Moreover, here, absent intervention, the Government had no right to appeal from the district court's judgment dismissing the case pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Accordingly, this Court should affirm the judgment of the Second Circuit which dismissed Petitioner's appeal for lack of subject matter jurisdiction.

C. The Government Bears None of The Indicia Of "Party" Status Prior To Its Intervention

There is no dispute that both the Government and the relator are real parties in interest in an action under the FCA.[11] However, Petitioner's formulation, that "real party in interest" plus the statutory requirement of naming the Government in the caption makes the

11. *But see United States ex rel. Taylor v. Gabelli*, 233 F.R.D. 174, 175 (D.C. 2005)("If the federal government remains a real party in interest when it declines to intervene, what sense is there in Congress providing them with the declination option in the first instance?")

Government a "party" for all purposes begs the question presented.[12]

The naming requirement in § 3730(b)(1) would not be necessary if the Government were a party; Fed. R. Civ. P. 10 and 17 would require that the Government be named in the caption. Furthermore, Rule 10 sets forth the minimum requirements for a caption. It does not prohibit additional names and other information.[13]

Petitioner concedes that the purpose of naming the Government is to ensure that the Government is bound by a judgment in the case. Pet. Brief at 23. That purpose is served by the mere statutory formality of naming the Government. Compliance with the naming requirements of the FCA and Fed. R. Civ. P. 17 does not compel the conclusion that the Government is a party for purposes of determining the relator's time to appeal.

The Government's relationship to an FCA action is *sui generis*. *Rodriguez*, 552 F.3d 297, 301 (Government's relationship to an FCA action is "neither fish no fowl"). However, none of the rights granted to the Government by the FCA compel the conclusion that the Government is

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12. *See Public Interest Bounty Hunters v. Board of Governors*, 548 F. Supp. 157, 162 (N.D. Ga. 1982)("The fact that the suit is brought in the name of the United States is a legal fiction designed to implement the "private attorney general theory underlying the cause of action itself").

13. The full caption in the Rodriguez case is an example of this: *Renee Rodriguez; Barbara King, In the Name of the United States Government Pursuant to the False Claims Act, 31 U.S.C. Section 3730, and Individually Pursuant to the New Jersey Conscientious Employee Protection Act v. Our Lady of Lourdes Medical Center.*

a party for purposes of determining the relator's time to appeal.

The Government's rights in an FCA action where it has not intervened are not coincident with the rights ordinarily exercisable by a "party" to an action. The Government's rights where it has not initially taken over the action are broader in some respects and narrower in other respects, than the rights afforded a party in an ordinary action.

Unless it so requests, the Government has no right to be served with copies of any pleadings beyond the initial complaint. 31 U.S.C. § 3730(c)(3). In contrast, Fed. R. Civ. P. 5(a)(1)(B) requires service of all pleadings after the original complaint upon every party.

The Government has no right at all to copies of any discovery papers, written motions or most other notices in an FCA action in which it has not intervened. In contrast, Fed. R. Civ. P. 5(a)(1)(C) requires that any discovery paper which is required to be served upon any party be served upon all parties and Rules 5(a)(1)(D) and (E) require service of written motions and notices on all parties. The Government may not withdraw or settle an action over a relator's objection except upon a judicial determination, after a hearing, that "the proposed settlement is fair, adequate, and reasonable under all the circumstances" (31 U.S.C. § 3730(c)(2)(B)).[14]

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14. Contrary to Petitioner's assertion, 31 U.S.C. § 3730(c)(4), which authorizes the district court to stay discovery "for a period of not more than 60 days," operates in favor of the relator. It imposes a time limit and circumscribes a court's otherwise broad discretion to stay discovery in the interest of justice. *See, e.g., United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970).

On the other hand, the FCA grants the Government certain rights which a nongovernmental co-party does not have. The Government's rights to unilaterally dismiss or settle an action, subject to notice and a hearing, and its right to veto a relator's dismissal are also not consistent with the rights of a party. It is quite clear that the Government cannot be, as Petitioner contends, a "party" for all purposes.

"The statute draws a sharp distinction between actions brought by the Attorney General under §3730(a) and actions brought by a private person under §3730(b)." *Rockwell International Corp. v. United States*, 549 U.S. 457, 477 (2007). *See also Hughes Aircraft Co. v. United States, ex rel. Schumer*, 520 U.S. at 945 n.5 ("a relator's interests and the Government's do not necessarily coincide").

As the Second Circuit wrote,

> what is of import is neither that Eisenstein brought a False Claims Act claim in the name of the United States, nor that the United States may be entitled to a portion of the recovery if Eisenstein prevails; what is of import is that the United States played no role in this matter before the district court.

(Pet. App. 13a) In contrasting this case with *United States v. American Society of Composers, Authors and Publishers*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964), the circuit court noted that the sixty day limit was applied there because the United States actively participated in the litigation. Pet. App. 11a.

American Society of Composers arose under the Expediting Act, 15 U.S.C. § 29, which specifically applies only to antitrust actions "in which the United States is the complainant." In contrast, 31 U.S.C. § 3730(b)(1) provides, in relevant part: "A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." "For the person" and "for the United States" does not make the action one brought by the United States, nor does the mere naming of the United States in the caption make the Government the complainant, as was the case in *American Society of Composers. Rockwell International Corp.*, 549 U.S. at 477.

Significantly, petitioner makes no mention of the Government's relationship to the three claims asserted by Petitioner which do not concern the FCA. If the district court had dismissed only the FCA claim, the caption identifying the Government would not change, but one could not reasonably contend that the Government remained a party for Petitioner's personal claims. And, if the district court had dismissed all of the claims except the FCA claim, one could not reasonably contend that the Government had any right to appeal from that judgment unless it was first permitted to intervene "for good cause." Naming the Government in the caption is, as the Second Circuit held, nothing more than a mere statutory formality.

In this case, where the Government has declined to intervene, the plain language of the FCA excludes the Government from an active role in the proceedings unless the Government later moves to intervene "upon a showing of good cause." 31 U.S.C. § 3730(c)(3). As the Second Circuit noted, "The inability to participate without moving

to intervene is simply not consistent with the principal characteristics of being a party to litigation" (Pet App. 8a) for purposes of determining the deadline for a relator to file a notice of appeal.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 08-660

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

Petitioner argues that the Government is a party in declined *qui tam* actions because the Government is the real party in interest, is named as a party in all filings, and is served under Federal Rule of Civil Procedure 4. (*See* Brief for Petitioner ("Pet. Br.") 16-26, 33; Point I.B., *infra*.) In so arguing, Petitioner relies on four circuit decisions (Pet. Br. 4, 20) and proposes a rule that is clear and easy to apply (Pet. Br. 28).

In response, Respondents and the Government essentially ignore the four circuit decisions and, in continuing to press for a participation-based definition of the term "party," commit themselves to a test far too uncertain for a workable jurisdictional deadline. (*See* Pet. Br. 28-30.) While the Government claims to limit the circumstances constituting the "active participation" that would render it a party, the claim is belied by the capacious language used by the Government to describe such participation and by the Government's long list of examples. In particular, the Government asserts that it is a party if it intervenes, or moves to dismiss, or vetoes a settlement, or objects to a voluntary dismissal, or otherwise exercises "its more substantive prerogatives," or "otherwise actively participates." (Govt. Br. 9, 14-16.) This can hardly be

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[1] This reply brief responds only to the most fundamental defects in the brief filed by Respondents ("Resp. Br.") and in the *amicus* brief filed by the Government ("Govt. Br.").

called a rule. The Government's effort to have it all ways should be rejected.

Respondents and the Government unavailingly argue that the FCA would not have provided for "interven[tion]" if the Government were already a party to the *qui tam* action. (*See* Resp. Br. 13, 31; Govt. Br. 6, 9-11, 24.) This argument's mistaken premise is that the FCA's term "interven[tion]" means intervention under Federal Rule of Civil Procedure 24, by which a non-party to an action becomes a party. Several FCA provisions, by according the Government the rights and powers of a party, demonstrate Congress's understanding that the Government is a party even in the absence of "interven[tion]," and thus that the FCA's term "interven[tion]" cannot mean Rule 24 intervention.

Moreover, legislative history establishes that the Government is a party prior to and regardless of its decision whether to "intervene" under the FCA. From 1943 until the 1986 amendments to the FCA, the Government, after being served with the *qui tam* complaint under Federal Rule of Civil Procedure 4, had to decide whether to enter an "appearance" (rather than whether to "intervene") in the action. But only after becoming a party to an action must one decide whether to appear. Thus, immediately prior to the 1986 amendments, the FCA demonstrated that the Government was already a party by the time it decided whether to appear. While the 1986 amendments revised "appearance" to "interven[tion]," Congress did not intend thereby to import Rule 24

intervention into the FCA. If Congress had so intended, it would have been undertaking a remarkable alteration – transforming the Government from a party to a non-party – and would have been needlessly inserting into the FCA a series of glaring anomalies, such as allowing the Government to be and to remain a *non-party* despite being identified in the complaint as a party, receiving service under Federal Rule of Civil Procedure 4, moving to dismiss, and obtaining a binding judgment in its own name. Nothing in the 1986 amendments or the legislative history indicates that Congress understood itself to be making such a significant change with such bizarre consequences.

ARGUMENT

I. Even Absent Intervention, the Government Is a "Party" to a *Qui Tam* Action

A. The Arguments of Respondents and the Government Fail to Establish That the Government Is Not a Party and Fail to Rebut Petitioner's Definition of "Party"

Why Respondents and the Government rely on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), is mystifying. (Resp. Br. 13; Govt. Br. 8, 15-16.) In *Devlin*, the Court held that nonnamed class members who object to a settlement but who do not properly intervene are

"parties" for purposes of appealing the approval of the settlement. 536 U.S. at 14. The Court held that such approval bound the nonnamed class member and therefore was a "final decision of [his] right or claim." *Id.* at 9 (internal quotation marks and citation omitted). The key factor, the Court concluded, was that "nonnamed class members are parties to the proceedings in the sense of being *bound* by the settlement." *Id.* at 10 (emphasis added). The dissent opined that only the *named* class representatives are parties for purposes of appealing the approval, and that "the parties to a judgment are those *named as such* . . . ." *Id.* at 15 (Scalia, J., dissenting).

Devlin is particularly supportive of Petitioner because the requirement held critical by the majority – being bound – and the requirement held critical by the dissent – being named – are *both* satisfied here. Respondents and the Government concede that the Government is bound by the judgment in a declined *qui tam* action. (Resp. Br. 27; Govt. Br. 27.) Nor do Respondents or the Government meaningfully rebut any of Petitioner's extensive authority for the proposition that, under the FCA's naming requirement, the complaint must name the Government *as a plaintiff*. (*See* Pet. Br. 9 n.5, 20-21, 24 n.15; *see also* Pet. Br. 22-23 & n.13.)

In a breathtaking assertion, the Government contends that "the caption of Petitioner's complaint does not identify the Government as a party-plaintiff" but rather identifies Petitioner as "the" party-plaintiff and the United States "as an entity for

whose benefit the action is brought . . . ." (Govt. Br. 24.) The Government does not, because it cannot, cite any authority for the proposition that the caption does not name the Government as a plaintiff, let alone *the* plaintiff. In fact, in the case title, the United States comes first, unintroduced by subordinating language like "*ex rel.*," which is short for "*ex relatione*," meaning "[o]n the relation or information of," *Black's Law Dictionary* 621 (8th ed. 2004). Thus, as far as the *title* is concerned, the United States is the plaintiff, and the relator is the source of the allegations.[2] (The 1986 amendments to the FCA established that the relator is *also* a party. *See* 31 U.S.C. § 3730(c)(1).) Moreover, the Government's logic is awry: Regardless of whether the *qui tam* action is brought "for the benefit of" the Government (as well as the relator, *see* 31 U.S.C. § 3730(b)(1)), it is still true that the Government must be identified as a plaintiff (per the naming requirements of the FCA and Rule 17(a)), and such identification has long been effectuated by the convention "United States *ex rel.* ___."[3] In any event, because the Government cannot

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[2] Whether or not the action is "for the benefit of" the United States (*see* Govt. Br. 24), the issue is what the title "United States ex rel. Smith v. Jones" actually says. In fact, this title says that the Government is the plaintiff and that Smith is the source of the information upon which the Government's complaint is based. *See Black's Law Dictionary* 621 (8th ed. 2004) ("A suit *ex rel.* is typically brought *by the Government* upon the application of a private party (called a relator) who is interested in the matter." (emphasis added)).

[3] The Government's assertion that Rule 17(a) does not "add anything to the analysis" (Govt. Br. 26) is unfathomable. While

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credibly assert that, had it intervened herein, the caption would be any different, the Government's contention implies, astonishingly, that the caption post-intervention still would not identify the Government as a plaintiff. To state the Government's position is to defeat it.[4]

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the relator is undisputedly a real party in interest (Resp. Br. 26; Govt. Br. 26), this is so only with respect to the relator's own claim (*i.e.*, the portion of the Government's claim assigned to the relator, *see Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 & n.4 (2000)). Thus, while the relator, as a real party in interest, can and should be named under Rule 17(a), that Rule separately requires the Government, which is a real party in interest by virtue of the unassigned portion of its claim (Pet. Br. 18), to be named as well. *See* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* ("*Wright*") § 1545, at 352-53 (2d ed. 1990). Moreover, as far as the unassigned portion of the Government's claim is concerned, the relator acts – that is, files the complaint and, after the Government's declination, conducts the action – as the Government's "statutorily designated agent." *Stevens*, 529 U.S. at 772. Where, as here, the principal never parts with the right as to which the agent represents it for purposes of litigation, the principal and not the agent is the real party in interest. 6A *Wright* § 1548, at 376-77 (2d ed. 1990). Therefore, the *qui tam* action must be brought in the name of the Government (as statutory principal) and not simply in the name of the relator (as statutory agent).

Cases holding that the caption is not "determinative" of the identity of the parties (*see* Govt. Br. 24) involve the odd complaint whose caption names an entity as a party but whose allegations do not, or *vice versa*. *See* 5A *Wright* § 1321, at 388 n.12 (3d ed. 2004). Barring such exceptional circumstances, the caption "is entitled to *considerable weight* when determining who the plaintiffs to the suit are . . . ." *Williams v. Bradshaw*, 459 F.3d 846, 849 (8th Cir. 2006) (cited at Govt. Br. 24-25). Nor does *Williams* support the Government's assertion that the

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Contrary to the Government's argument (Govt. Br. 8, 15-16), *Devlin* does not remotely stand for the proposition that participation in district court proceedings determines whether one is a party for purposes of appeal. The relevant factor in *Devlin* was not that the nonnamed class member "actively participate[d]" (Govt. Br. 9) – by objecting to the settlement or otherwise – but rather that the class member was bound by the settlement: "What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement." 536 U.S. at 10. In a declined *qui tam* action, the judgment binds the Government by operation of statutory requirements – *i.e.*, those making the Government a real party in interest, a named plaintiff, and a recipient of service under Rule 4 – rather than by any "active participation." Because the Government is so bound, the degree of its participation in district court proceedings is irrelevant to whether it is a party under *Devlin*.[8]

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caption in this case did not identify the Government as a party plaintiff (Govt. Br. 24-25): While the caption in *Williams* named "Lateca Williams . . . on Behalf of the Heirs at Law" when it should have named the heirs themselves, *see* 459 F.3d at 848, the caption in the instant case named the "United States" itself (in the phrase "United States, upon the relation of Irwin Eisenstein," *see supra* at 4-5 and n.2) rather than "Irwin Eisenstein, on behalf of the United States."

[8] Though the Government also cites a *Rooker-Feldman* case, *Lance v. Dennis*, 546 U.S. 459, 465 (2006), for the proposition that participation determines party status, the *Lance* Court made clear that the determining factor is whether a party in a

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Contrary to Respondents' assertion, *Stevens* never distinguished between a "'party'" and a "'real party in interest,'" and never even mentioned the phrase "real party in interest." (*See* Resp. Br. 15.) Respondents also mistakenly argue that, "[had] the Government been a party plaintiff to the litigation in *Stevens*, then there clearly would have been standing because the alleged injury in fact was indisputably sustained by the Government." (*Id.*) By failing to state for whom "there clearly would have been standing," Respondents conflate the standing analysis of the relator's claim with the standing analysis of the Government's claim. Given the *Stevens* Court's holding that the relator has his *own* claim, the Court would still have needed to perform an independent analysis of the relator's standing even if the Government had intervened. The fact of the *Stevens* Court's standing analysis does not at all establish that the Government was not a party there.

From the *Stevens* Court's statement that the judicial power exists to redress injury "'*to the complaining party*,'" *Stevens*, 529 U.S. at 771-72 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)), Respondents somehow conclude that *Stevens* held the Government a non-party. (Resp. Br. 15-16.) The conclusion does not follow. In *Stevens*, the Government's injury was not in doubt; the *relator's* injury

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later proceeding was "named" in an earlier proceeding. *id.* at 466 n.2.

was the issue, to which the Court addressed itself. The Court focused on the relator as "the complaining party" because, as the one who files the *qui tam* complaint and who has an interest distinct from the Government's, the relator must have standing separate and apart from the Government's standing. But nothing in *Stevens* suggests that the Government was not a party. Though Respondents apparently read the phrase "the complaining party" to mean that the relator is the *only* plaintiff, any such reading is baseless: The *Warth* Court used the singular ("complaining party") because it was generalizing in the singular, and the *Stevens* Court simply took the quotation as it found it.

Attacking straw men, both Respondents and the Government contend that, under Federal Rule of Appellate Procedure 4(a)(1)(B), being a real party in interest does not *by itself* render one a party (Resp. Br. 17, 25; Govt. Br. 23-24), and that the FCA's naming requirement does not *by itself* render one a party (Resp. Br. 27; Govt. Br. 24-27).[6] But Petitioner does not argue that either of these is sufficient on its own to render the Government a party.[7] (Pet. Br. 5, 20.)

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[6] Hence, the Government's citation to the titles of habeas cases (Govt. Br. 25) is unavailing: In such cases, the Government is not a real party in interest, and thus the naming of the Government in the titles of those cases is insufficient to render it a party.

[7] Similarly, Respondents are incorrect in asserting without the benefit of citation that the Fifth, Seventh, and

(Continued on following page)

Insofar as the Government argues that its active participation (*e.g.*, its veto of a settlement) renders it a party even absent intervention, the Fifth Circuit's decision in *Searcy v. Philips Electronics N. Am. Corp.*, 117 F.3d 154 (5th Cir. 1997), actually undercuts the Government's position. (*See* Govt. Br. 18-19 (citing *Searcy* with approval in argument that veto of settlement gives Government "party status").) In *Searcy*, the Fifth Circuit held that, absent intervention, the Government is *not* a party for purposes of the right to appeal and that, to appeal, the Government must satisfy the prerequisites applied to appeals by non-parties. *Searcy*, 117 F.3d at 156, 157. To the extent that the Government's participation – its veto – was relevant, it was so only to support the Government's effort to satisfy those prerequisites. *Id.* at 157. In any event, it is not clear that *Searcy* survives *Devlin*. *Devlin* held that one who is bound, though not a named party, is a party for purposes of the right to appeal. Thus, in a declined *qui tam* action, the Government – which is bound *and* a named party, *see supra* at 4-5 – is *a fortiori* a party for purposes of the right to appeal.[8]

Ninth Circuits held "real party in interest" status to be sufficient for party status. (Resp. Br. 17.) In fact, those courts all based their holdings as well on the identification of the Government as a party in the case filings. (Pet. Br. 20 (citing cases).)

[8] This conclusion disposes of Respondents' numerous contentions that the Government absent intervention has no right of appeal. (*See, e.g.*, Resp. Br. 17, 20, 22, 26.) In *United States v. Brumfield*, 188 F.3d 303 (5th Cir. 1999), and *United*

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B. The Statutory Text and Legislative History Demonstrate That the Government Is a Party to a *Qui Tam* Action Before It Even Decides Whether to Intervene

Respondents and the Government assert, as did the Second Circuit below, that the FCA would not have provided for "interven[tion]" by the Government, 31 U.S.C. § 3730(b)(2), if the Government were already a party to the *qui tam* action. (Resp. Br. 13, 31; Govt. Br. 6, 9-11, 24; Pet. App. 8a.) This argument is based on the mistaken premise that the FCA's term "interven[tion]" means intervention under Federal Rule of Civil Procedure 24. FCA intervention, pursuant to which the Government "proceeds with the [*qui tam*] action" and "[has] the primary responsibility for prosecuting the [*qui tam*] action," 31 U.S.C. § 3730(b)(2) & (c)(1), is materially different from Rule 24 intervention, pursuant to which a non-party to an action becomes a party. FCA intervention is not the means by which the Government becomes a party to a *qui tam* action. Indeed, the Government becomes a party when the relator files a *qui tam* complaint naming the Government as a party and serves the Government under Federal Rule of Civil Procedure 4 – long before the point at which the Government must

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States v. Hallahan, 768 F.2d 754 (6th Cir. 1985) (*see* Resp. Br. 22), the facts are so sparely described and the holdings are so conclusory that it is impossible to determine what the court meant by "participation" or by "the 'traditional' posture" required for application of the 60-day appellate deadline.

decide whether to intervene under the FCA. Rather, FCA intervention is the means by which the Government appears in a *qui tam* action alongside the pre-existing party plaintiff – the relator.

Several other FCA provisions accord the Government the rights and powers of a party – and hence regard the Government as a party – even in the absence of "interven[tion]." These provisions entitle the Government to move to dismiss, to veto any settlement or voluntary dismissal, to obtain the bulk of any recovery, to obtain a binding judgment in its own name, and to be served under Federal Rule of Civil Procedure 4.[9] (By contrast, Rule 24 intervention never accords an intervenor "primary responsibility for prosecuting the action.") The foregoing FCA provisions, which presuppose that the Government is a party even absent intervention, demonstrate that the FCA's term "interven[tion]" cannot mean Rule 24 intervention.[10]

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[9] Even the authority cited by the Government demonstrates that FCA intervention is not the equivalent of Rule 24 intervention: "'[Intervention under Rule 24 is] a procedure by which an outsider with an interest in a lawsuit may come in as a party though the outsider has *not been named as a party by the existing litigants*.'" (Govt. Br. 9-10 (emphasis added) (citation omitted).) Here, by virtue of the FCA's naming requirement, an existing litigant – namely, the relator, *see* 31 U.S.C. § 3730(c)(1) – has indeed named the Government as a party.

[10] Contrary to the Government's assertion (Govt. Br. 14), the reason for Petitioner's contention that intervention is not a proper test of party status is not that the Government's presence

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The Government's primary support for the premise of equivalence between FCA intervention and Rule 24 intervention is the question-begging contention that the word "intervention" is a "legal term of art with an established legal meaning." (Govt. Br. 11.) Only by reading "intervention" in isolation from the FCA's other provisions, which regard the Government as a party and guarantee the Government a uniquely dominant role, can the Government make this contention. Yet such isolation violates the very principle on which the Government purports to rely, namely, that "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (Govt. Br. 13 (quoting *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)).) Read in the context of the FCA's provisions according the Government the above-described rights and powers absent intervention, the FCA's term "interven[tion]" cannot be the term of art that the Government claims: The statutory context of the FCA's intervention provision both contemplates that the Government is already a party prior to FCA intervention and accords the Government a prosecutorial primacy unknown to Rule 24.

In a self-defeating argument, the Government quotes authority stating that Congress, when using legal terms of art, "*presumably* knows and adopts the

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in a *qui tam* action is pervasive, but rather that, even absent intervention, the FCA accords the Government party powers and thus regards the Government as a party.

cluster of ideas that were attached" to each such term "in the body of learning from which it was taken." (Govt. Br. 11 (quoting, *inter alia*, *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added)).) The emphasized language makes clear that Congress's adoption of the "cluster of ideas attached" to the term of art is merely a presumption. Here, even assuming *arguendo* that the bare word "intervention" is a term of art,[11] any such presumption of adoption is rebutted by the above-described FCA provisions that regard the Government as a party even absent intervention.

The above-described FCA provisions are sufficient on their own to demonstrate that the FCA's term "interven[tion]" does not mean Rule 24 intervention and that Congress understood the Government to be a party prior to and regardless of its

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[11] The Government's brief does not convey a clear understanding of the phrase "term of art." While the Government argues, in the same breath, that "intervention" should receive its "ordinary meaning" *and* is a "term of art" (Govt. Br. 11), this Court uses the phrase "ordinary meaning" *in contradistinction to* the phrase "term of art." *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006) ("But 'discharge' presumably is broader, else superfluous, and since it is neither defined in the statute *nor a term of art*, we are left to construe it 'in accordance with its *ordinary or natural meaning*.'" (emphases added) (citation omitted)); *Gonzales v. Oregon*, 546 U.S. 243, 282-83 (2006) ("We do not force *term-of-art definitions* into contexts where they plainly do not fit and produce nonsense. What is obviously intended in § 821 is the *ordinary meaning* of 'control' . . . . (emphases added) (quoting Webster's dictionary) (Scalia, J., dissenting)).

decision whether to intervene in a *qui tam* action. Nonetheless, legislative history confirms this conclusion. In 1943, Congress created a mechanism by which the Government could take over and conduct the relator's *qui tam* action. Specifically, Congress provided that, after commencing the *qui tam* action, the relator must effect service on the United States Attorney and the Attorney General, and that "[t]he United States shall have sixty days, after service as above provided, within which to *enter an appearance* in such suit." 31 U.S.C. § 232(C) (Supp. III 1943) (emphasis added). If the United States declines, then the relator "may carry on such suit," but if the United States "shall *enter appearance* in such suit the same shall be carried on solely by the United States." *Id.* (emphasis added). Although Federal Rule of Civil Procedure 24, entitled "Intervention," was already long in existence by the time of the 1943 amendments to the FCA, *see, e.g., United States v. C.M. Lane Lifeboat Co.*, 25 F. Supp. 410, 411 (E.D.N.Y. 1938), Congress in 1943 used the term "appearance" rather than the term "intervention."

The use of "appearance" is telling: One is not obligated to enter an appearance in an action until one is already a party to the action, by virtue of having been identified in the complaint as a party and having been served with process. In this context, an appearance is a voluntary, overt act by which one who has been served and thus is *already* a party submits to the jurisdiction of the court, enabling that party to avoid default and to invoke the court's power

in the party's favor. *See Roell v. Withrow*, 538 U.S. 580, 586 n.3 (2003); *Cutting v. Town of Allenstown*, 936 F.2d 18, 21 n.1 (1st Cir. 1991); *Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 873-74 (W.D. Pa. 1961). An appearance, moreover, is not necessary for party status. If, for example, a person is identified in the complaint as a defendant and is served with process, such person is a party but may nonetheless default for lack of appearance. *See* Fed. R. Civ. P. 5(a)(2) (providing in subsection entitled "If a *Party* Fails to *Appear*": "[A] *party* who is in default for failing to *appear*" need not be served with post-complaint pleadings, motions, and similar documents (emphases added)). Moreover, a binding default judgment may be entered against a party despite – indeed, because of – the lack of appearance. *See* Fed. R. Civ. P. 55(a) ("When a *party* against whom a judgment for affirmative relief is sought has *failed to plead or otherwise defend*, . . . the clerk must enter the *party's* default . . . ." (emphases added)); *id.* 55(b) ("If the plaintiff's claim is for a sum certain . . . , the clerk . . . must enter judgment for that amount and costs against a *defendant* who has been *defaulted for not appearing* . . . ." (emphases added)). Thus, one may be a party to an action without ever appearing.

By using the term "appearance" in the 1943 amendments, Congress regarded the Government, upon being served with the *qui tam* complaint, as one who had become a party by having been named in and served with a complaint and who was deciding

whether to appear. In Congress's view, the Government, after service with the *qui tam* complaint, would have to decide whether to appear – and, following a decision not to appear, would be waiving its rights to conduct the action and would instead be subject to whatever judgment was obtained by the relator.[12] In short, the term "appearance" in the 1943 amendments reveals Congress's understanding that the Government was already a party to the *qui tam* action before it decided whether to appear.

The term "appearance" remained in the FCA until 1986, when Congress revised the statutory language from "appearance" to "intervene."[13] The Senate Report on the 1986 amendments included a telling characterization of this revision.[14] According to

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[12] For this reason, Respondents draw the wrong inference from the observation that "[t]he *Stevens* case would have been over if the Court had dismissed the relator." (Resp. Br. 15.) The case would have been over not because the Government was not a party, but rather because it was a party who had decided not to appear. The Government recognized this conclusion in asserting that, when the Government does not intervene in a *qui tam* action, "the usual inference is that the government has chosen to forgo the benefits and to avoid the burdens that party status would entail." (Govt. Br. 15.)

[13] Compare 31 U.S.C. § 3730(b)(2) (1982) ("The Government may proceed with the action by entering an appearance . . . .") *with id.* (1986) ("The Government may elect to intervene and proceed with the action . . . .").

[14] The Senate Report is particularly instructive because Congress in 1986 enacted the Senate bill, S. 1562, in lieu of the House bill, H.R. 4827. *See* 1986 U.S.C.C.A.N. 5266, 5266. Moreover, resort to legislative reports is appropriate here, and

(Continued on following page)

that Report, "*current law*" – meaning pre-1986 law – "provides that within the initial 60-day period . . . , the Government must indicate whether it will *intervene* and proceed with the action or decline to enter." S. Rep. No. 99-345, at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288 (emphases added).[15] Pre-1986 law, however, used the term "appearance," not the term "interven[tion]." Thus, Congress did not understand itself to be making a substantive change by the revision. In other words, whatever label one attaches to the statutory procedure by which the Government begins to conduct a *qui tam* action, that procedure after the 1986 amendments was understood to be the same as it had been previously.[16] Consequently,

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not only to rebut Respondents' own use of such material (*see* Resp. Br. 18). The FCA provisions according the Government the rights and powers of a party even absent "interven[tion]," *see supra* at 11-14, raise a substantial question as to whether the FCA's term "interven[tion]" means something other than Rule 24 intervention. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language *and then to legislative history if the statutory language is unclear*." (emphasis added)); *United States v. Gayle*, 342 F.3d 89, 94 (2d Cir. 2003) (committee reports are "[t]he most enlightening source of legislative history").

[15] The portion of the Senate Report quoted by Respondents contains a similar remark (*see* Resp. Br. 18): "Under *current law*, the Government is barred from reentering the litigation once it has declined to *intervene* during this initial period." S. Rep. No. 99-345, at 26, 1986 U.S.C.C.A.N. at 5291 (emphases added).

[16] As the Government itself suggests (Govt. Br. 13), the word "interven[tion]" was more consonant with another provision of the 1986 amendments clarifying that the relator is a

(Continued on following page)

Congress has always understood that the Government becomes a party to a *qui tam* action well before deciding whether to "appear[ ]" or (in the revised language) "intervene."

Another portion of the legislative history demonstrates that Congress in 1986 understood the Government's intervention to be something other than Rule 24 intervention. The House bill, H.R. 4827, provided that, if the Government elected to intervene and proceed with the action, the relator "shall have a right to continue in the action with the same rights as provided by *Rule 24(a) of the Federal Rules of Civil Procedure*." H.R. 4827, 99th Cong. § 3, A&P H.R. 4827 (Westlaw FALSECLM-LH 16), at *8 (1986) (amending 31 U.S.C. § 3730(c)(1)) (emphasis added). The House Report described this provision as requiring that, when the Government "enters an action filed by a relator, the relator remains a party to the suit with the same rights as if he had been an *intervenor as of right under Rule 24(a), Federal Rules of Civil Procedure*." H. Rep. No. 99-660, A&P H.R. Rep. 99-660 (Westlaw FALSECLM-LH 3), at *24 (1986) (emphasis added). The Government's intervention under the FCA, by contrast, was provided for and described without any reference to Rule 24. These selective references to Rule 24, too, are telling: They demonstrate that Congress was aware of the distinction

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party before, during, and after the Government's intervention decision. *See* 31 U.S.C. § 3730(c)(1) (1986) (relator has right to "continue" as party to action if Government intervenes).

between Rule 24 intervention and the Government's own distinct intervention under the FCA, and that, when Congress wanted to specify Rule 24 intervention in the FCA context, it knew how to do so.

Respondents' and the Government's argument under Federal Rule of Civil Procedure 5 is unavailing. (*See* Resp. Br. 28; Govt. Br. 13-14.) Rule 5 does not determine who is a party; rather, it provides for consequences flowing from the determination, made independently of Rule 5 (*see* Pet. Br. 16-25, 33; *supra* at 1), of who is a party. Moreover, by requiring that the Government be served *upon request*, section 3730(c)(3) restricts, rather than repeats, the service obligations otherwise applicable under the procedural rules. By restricting such obligations, section 3730(c)(3) is the opposite of superfluous.[17]

For several reasons, Petitioner's reading of the FCA's term "interven[tion]" is preferable to that of Respondents and the Government. First, far from reading the term in isolation, Petitioner's reading harmonizes the term with the statutory context, which repeatedly regards the Government as a party even absent intervention. Second, it relies on actual provisions of the FCA – *i.e.*, those according the Government party powers – rather than on a canon of

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[17] In statutory actions, it is not unusual for courts to restrict obligations that arise under the Federal Rules of Civil Procedure and that otherwise bind parties. *See* Point III.A., *infra*.

construction (*i.e.*, that regarding interpretation of a "term of art"). Third, it demonstrates that the canon of construction does not even apply because the statutory context rebuts the presumption underlying the canon. Fourth, it is confirmed by the Senate Report, which is a more reliable, because statute- and case-specific, source of authority than a canon of construction. Fifth, it avoids the fractured, principle-less reading advanced by Respondents and Government, namely, that the Government is a party if it intervenes, or moves to dismiss, or vetoes a settlement, or objects to a voluntary dismissal, or "takes some other affirmative steps," or otherwise exercises "its more substantive prerogatives," or "otherwise actively participates."[18] (Resp. Br. 6, 17, 20, 25; Govt. Br. 6, 9, 14-16.)

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[18] The Government does not clearly state whether, besides intervention, the *only* other acts that can render the Government a party are moving to dismiss, vetoing a settlement, or objecting to a voluntary dismissal. *Compare* Govt. Br. 14-15 (indicating that seeking stay of relator's discovery is included among "significant prerogatives" and, by extension, "more substantive prerogatives") *with* Govt. Br. 18 (referring to treatment of Government as party "in those two narrow circumstances"). Certainly, the Government's effort to couch its position in capacious language – such as "otherwise actively participates," "has significant prerogatives," and "exercises its more substantive prerogatives" (Govt. Br. 9, 14-16) – suggests that the Government is not prepared to confine the circumstances under which it is a party absent intervention. The Government expressly so admits. (Govt. Br. 16.) The Government thereby belies its claim that its position "would create no meaningful uncertainty" concerning the application of

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Finally, if Congress in 1986 had truly intended to change "appearance" to mean Rule 24 intervention, then (by Respondents' and the Government's logic) it was undertaking the quite significant change of converting the Government from a party to a non-party – and thereby placing in the FCA's text a series of severe internal contradictions, such as allowing a non-party to move to dismiss, to veto a settlement, to obtain a judgment in its own name for the bulk of any recovery, and to remain a non-party despite being named in the complaint as a party and being served under Federal Rule of Civil Procedure 4. Nothing in the 1986 amendments or the legislative history indicates that Congress understood itself to be making such a momentous change with such bizarre consequences. Nor do Respondents or the Government offer any reason why Congress would want to alter the FCA so radically. In short, if the FCA's term "interven[tion]" contemplates not Rule 24 intervention but rather an appearance alongside a pre-existing plaintiff, then internal contradictions disappear, and all of the FCA's above-described provisions are harmonized. If, by contrast, the term is understood to mean Rule 24 intervention, then the FCA will be laden with numerous and unnecessary anomalies that Congress could not have intended.

Federal Rule Appellate Procedure 4(a)(1)(B) to declined *qui tam* actions. (Govt. Br. 18; *cf.* Pet. Br. 28-30 (arguing that participation-based rule for determining party status would be too uncertain to be workable).)

II. Respondents and the Government Mischaracterize Petitioner's Argument Concerning the Need for Clarity in Rule Interpretation

Contrary to the suggestion of Respondents and the Government, Petitioner does not argue that, in cases of doubt, the courts should apply the longer deadline or the most generous interpretation. (Resp. Br. 23-24; Govt. Br. 28.) Rather, Petitioner argues that, if the Government is not held to be a party under Federal Rule of Appellate Procedure 4(a)(1)(B), there will always be a trap for the unwary because of the ongoing requirement that the Government be identified as a plaintiff in the case caption and filings. (Pet. Br. 25-27.) If Rule 4(a)(1)(B) is read to render the Government a party consistent with that requirement, then the trap will be avoided. The length of the applicable appellate deadline is irrelevant to the basis for Petitioner's argument.

Respondents and the Government would read Rule 4(a)(1)(B) to apply the 60-day deadline where the Government is not a "party" to, but rather an "active participant" in, the action. Whatever may be said about Petitioner's reading of the word "party" in Rule 4(a)(1)(B), Petitioner's reading is vastly more literal than that proposed by Respondents and the Government. (*Cf.* Resp. Br. 4; Govt. Br. 27-28.)

The Government argues that relator's *counsel* will not likely be confused following a holding in favor of the 30-day deadline. (Govt. Br. 29-30.) But that

argument ignores the fact that in *Rodriguez* (*see* Pet. Br. 4) the relator's *counsel* was indeed confused. (*See* Pet. Br. 26-27 & n.16.)

Contrary to the Government's intimation (Govt. Br. 28-29), Petitioner's argument that there will be a likelihood of confusion even following a holding by this Court in favor of the 30-day deadline is supported by the *Rodriguez*, *Lu*, *Haycock*, and *Russell* decisions (*see* Pet. Br. 4, 25-27). Absent a controlling decision by this Court, each of the courts of appeals is supreme in its own jurisdiction, yet this supremacy did not prevent the Third, Fifth, Seventh, and Ninth Circuits from acknowledging the risk of confusion and applying the 60-day deadline.

III. Respondents' and the Government's Other Arguments Are Meritless

A. That the Government Is Not Subject to Party Discovery in Declined *Qui Tam* Actions Is Due to Its Declination and Does Not Demonstrate That It Is a Non-Party

Although the Government embraces Petitioner's contention that the Government, after declination, is not subject to party discovery under Federal Rules of Civil Procedure 26-37 (Govt. Br. 20), the Government embraces it for the wrong reason. The reason that the Government after declination is not subject to party discovery is not that the Government is not a party. (*See* Govt. Br. 10.) Rather, the reason is that its

declination frees it from assuming the burdens of party status. (*See* Govt. Br. 9.) As the Government argued in *Searcy*, because the Government after declination has little control over the relator's discovery, it makes sense to protect the Government from ordinary party discovery. *See* Reply Brief for the Appellant United States of America, *Searcy v. Philips Electronics N. Am. Corp.* (5th Cir. 1997) (No. 96-410515), 1997 WL 33562499, at *18 (Jan. 2, 1997). Indeed, when a party fails to appear, *see supra* at 15-17, it is ordinarily not subject to party discovery. *See Blazek v. Capital Recovery Assocs.*, 222 F.R.D. 360, 360-61 (E.D. Wis. 2004) (where defendant "did not answer or otherwise appear," defendant "elected, in essence, to give up party status [and] should not have to bear the burdens that the discovery rules impose on parties"); *see also Cartier v. Geneve Collections, Inc.*, No. CV 2007-0201 (DLI) (MDG), 2008 WL 1924921, at *1 (E.D.N.Y. Apr. 29, 2008) (citing cases).

It is not unusual for courts to hold that a party to a statutory civil action – especially the Government – is not subject to ordinary party discovery. *See, e.g., Wolf v. C.I.A.*, 569 F. Supp. 2d 1, 9-10 (D.D.C. 2008) ("Discovery is generally unavailable in FOIA actions." (internal quotation marks and citation omitted)); *NVE, Inc. v. Department of Health and Human Servs.*, 436 F.3d 182, 195 (3d Cir. 2006) ("There are no grounds in the APA to permit discovery in this case."); *United States v. Southern Tanks, Inc.*, 619 F.2d 54, 56 (10th Cir. 1980) ("As a general rule, discovery is available in summons enforcement proceedings only

in extraordinary situations."); *Harris v. Nelson*, 394 U.S. 286, 290 (1969) ("We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case . . . .").

B. The Purpose of the 60-Day Deadline Would Still Be Served by Treating the Government as a Party Regardless of Intervention or Participation

According to Respondents and the Government, the purpose of the 60-day deadline would not be served by applying that deadline here. The Government asserts that, where the Government neither intervenes nor actively participates in the district court, it does not conduct the "formal" review process for determining whether to appeal and thus does not require the longer period. (Govt. Br. 20-22.) As a preliminary matter, Petitioner has no way of testing that assertion or of determining whether there is nonetheless an *informal* review process and, if so, how long it takes. In any event, reasonable minds may differ about whether the Government's participation is sufficiently active in a particular case. The Government may well end up needing but not getting the 60 days because a court of appeals decides, after the fact and over the Government's objection, that the Government's participation was not sufficiently

active. This problem would be solved – and the purpose of the 60-day deadline would be served – by treating the Government as a party regardless of intervention or participation.

Respondents argue under *Searcy* that, if the Government appeals without intervening, then it has no right to appeal, must pursue a non-party appeal, and thus has no need for the 60-day period. (Resp. Br. 22, 25-26.) This argument incorrectly assumes that the Government would not be entitled to the 60-day deadline if it pursues a non-party appeal. Nothing in *Searcy* supports that assumption. Indeed, the Fifth Circuit in *Searcy*, notwithstanding its holding that the Government is not a party for purposes of the appeal-as-of-right issue, explicitly allowed that the 60-day deadline might nonetheless apply in a declined *qui tam* action, *see Searcy*, 117 F.3d at 156 (citing *Haycock*), and, two years later, the Fifth Circuit so held in *Russell*. In any event, *Searcy* itself contained no holding as to whether the 30- or 60-day deadline applies where the Government appeals without intervening. Finally, if *Searcy* does not survive *Devlin*, *see supra* at 10, then the premise of Respondents' argument fails.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief for Petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 13, 2009

SUPPLEMENTAL BRIEF

No. 08-660

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER PURSUANT TO SUPREME COURT RULE 15.8

The need for Supreme Court review is now even more urgent. On December 30, 2008, after the briefing on this petition was fully submitted, the Third Circuit issued *Rodriguez v. Our Lady of Lourdes Medical Center*, No. 06-5207, ___ F.3d ___, 2008 WL 5411717 (3d Cir. Dec. 30, 2008).[1] Consistent with the majority of circuit courts addressing this issue, the *Rodriguez* Court held that the 60-day time limit in Rule[2] 4(a)(1)(B) applies to an appeal in a *qui tam* action under the FCA where the Government has declined to intervene. (*See* Supp. App. at 9-10.) *Rodriguez* explicitly rejects the analysis of the Second Circuit's decision below and thereby underscores the need for this Court to grant the petition – not only to correct the Second Circuit's radical departure from the plain meaning of Rule 4(a), but also to clarify an important jurisdictional question regarding which there is a continuing, indeed deepening, circuit split.

1. With *Rodriguez*, the circuit courts are now split 4-2 on the issue herein. The Third, Fifth, Seventh, and Ninth Circuits all hold that the 60-day time limit applies where the Government declines to intervene. The outliers are the Tenth Circuit, which

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[1] The *Rodriguez* decision is reprinted in the attached Supplemental Appendix ("Supp. App.") at 1-16.

[2] All short forms and abbreviations defined in Petitioner's Petition for Writ of Certiorari and in the Reply Brief for Petitioner are incorporated herein by reference.

itself was a divided court (*see* Pet. at 4), and the Second Circuit, whose interpretation of "party" in Rule 4 was not based on any rule or statute and was clearly inconsistent with the plain meaning of Rule 4(a)(1)(B) (*see* Pet. at 9-10).

Contrary to the Second Circuit's decision below, the *Rodriguez* Court held that, because the Government unequivocally remained a named party to the action even after declining to intervene, the 60-day time limit in Rule 4(a)(1)(B) applied. (*See* Supp. App. at 9 ("We . . . join our colleagues in the Fifth, Seventh and Ninth Circuits in finding significant that, even when it declines to intervene, the United States remains a party to a *qui tam* action in the literal sense, *i.e.*, its name is on the caption.").)[3] *Rodriguez* militates strongly in favor of granting review and reversal of the Second Circuit's decision, which held that the word "party" as used in Rule 4(a)(1)(B) means something other than a named party to a lawsuit. (*See* Pet. at 9-10.)

2. Also contrary to the Second Circuit's decision, *Rodriguez* held that applying the 30-day time limit risks undue confusion and that procedural rules should be interpreted with an extra measure of clarity:

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[3] In holding that the 60-day time limit applied, the Third Circuit also found persuasive the provision of the FCA allowing the Government to collect 70% of the damages awarded to a relator in a successful suit. (*See* Supp. App. at 8.) Petitioner advanced this exact argument here. (*See* Pet. at 10.)

> Applying the shorter deadline may confuse litigants who, based on a literal reading o[f] Rule 4(a)(1), assume that the longer deadline applies. It is especially important, when interpreting procedural rules, that we avoid any reading likely to cause confusion. *See* . . . [*United States ex rel. Russell v. Epic Healthcare Mgt. Group*, 193 F.3d 304, 308 (5th Cir. 1999)] (reading Rule 1 of the Federal Rules of Civil Procedure as a "charge to resist reading the Rules in a manner that lays traps for the unwary"). Thus, considerations of clarity for litigants cut in favor of applying the longer deadline.

(Supp. App. at 9 (citations omitted).)

3. *Rodriguez* further rejected the Second Circuit's holding that the Government post-declination does not need the longer, 60-day deadline. Observing that the Government post-declination may still move to appeal, the *Rodriguez* Court held that "the slowness of the Government continues to be relevant to determining how long the right to appeal should remain available." (Supp. App. at 10.) In support of this holding, the Court cited *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 157 (5th Cir. 1997), which held that the Government may appeal an adverse decision even without formally intervening under 31 U.S.C. § 3730(c)(3). (Supp. App. at 10.)

4. Finally, *Rodriguez* contradicts the assertions of the Second Circuit and Respondents that "'the issue has not arisen in the majority of circuits despite

the many decades in which the provisions of Rule 4(a)(1)(B) and False Claims Act *qui tam* actions have coexisted,'" and that "'any reasonable counsel would allay these concerns by sensibly filing a notice of appeal within 30 days.'" (Opp. at 7 (quoting Pet. App. at 14a).) *Rodriguez*, in which the notice of appeal was filed by counsel, is now the sixth decision by a circuit court on this issue and comes only *four months* after the Second Circuit's decision below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-5207

RENEE RODRIGUEZ; BARBARA KING,
In the Name of the United States Government
Pursuant to the False Claims Act, 31 U.S.C.
Section 3730, and Individually Pursuant to the
New Jersey Conscientious Employee Protection Act

Appellants

v.

OUR LADY OF LOURDES MEDICAL CENTER

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 06-cv-00129)
District Judge: Honorable Rober B. Kugler

Submitted Under Third Circuit LAR 34.1(a)
December 1, 2008

Before: AMBRO, WEIS, and VAN ANTWERPEN,
Circuit Judges

(filed: December 30, 2008)

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OPINION OF THE COURT

AMBRO, *Circuit Judge*

Renee Rodriguez and Barbara King filed a *qui tam* complaint pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, against their former employer, Our Lady of Lourdes Medical Center (the "Medical Center"), a New Jersey health care provider. The United States declined to intervene in the action, and the District Court ultimately dismissed the complaint for failure to state a claim for which relief can be granted. Rodriguez and King then filed a notice of appeal 56 days after the entry of judgment. We decide whether this appeal is subject to the 30-day filing

deadline that generally applies to civil suits or the 60-day deadline that applies when the United States is a party.

We hold that, though the United States declined to intervene in the action, the 60-day deadline still applies and that Rodriguez and King's notice of appeal was therefore timely. Nonetheless, we affirm the District Court's dismissal on the merits.

I. Facts and Procedural History

Rodriguez and King are licensed practical nurses who were formerly employed by the Medical Center. In January 2006, they filed a *qui tam* complaint against the Center in the District of New Jersey, alleging fraud on the Government in violation of the False Claims Act.[1] The allegations in the complaint

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[1] "*Qui tam* actions have a long history and were used in England before the foundation of this country." *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 509 (3d Cir. 2007). The term "*qui tam*" itself is a shortening of "the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000). Under modern practice, *qui tam* actions are brought by private plaintiffs on behalf of the Government in exchange for some portion of any resulting damages award. *See id.* at 773-74.

Rodriguez and King's complaint also alleged that they were terminated from their employment for objecting to illegal practices in violation of New Jersey's Conscientious Employee Protection Act, N.J. Stat Ann. § 34:19-1 *et seq.* The District Court declined to exercise supplemental jurisdiction over this

(Continued on following page)

centered on the Bergan Lanning Health Center ("Bergan Lanning") in Camden, New Jersey. According to the complaint, Bergan Lanning is jointly operated by the Medical Center and the Camden County Department of Health and Human Services and receives funding from the federal Government. Rodriguez and King alleged that, while employed by the Medical Center, they were assigned to do work with outreach programs housed by Bergan Lanning that provide medical services to the homeless and the uninsured working poor.[2] They asserted that, beginning in June 2004, beneficiaries of those programs could get prescriptions filled by persons who were not licensed pharmacists under the New Jersey Pharmacy Act, N.J. Stat. Ann. § 45:1-1 *et seq.*[3] This, they contended, amounted to a violation of the False Claims Act insofar as "allowing non-licensed individuals . . . to dispense drugs in violation [of New Jersey law] constitutes a false certification . . . to get

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claim when it dismissed the False Claims Act action, *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, No. 06-0129, 2006 WL 3193838, at *2 (D.N.J. Nov. 1, 2006), and it is not before us.

[2] According to the complaint, Rodriguez was assigned to work with Project H.O.P.E. (Homeless Outreach Program Enrichment), which provides health care and social services to homeless individuals and families, while King was assigned to work with Community Health Practice, which serves as a primary clinic to the uninsured working poor.

[3] The New Jersey Pharmacy Act was repealed and replaced by the New Jersey Pharmacy Practice Act, N.J. Stat. Ann. § 45:14-40 *et seq.*

a claim paid or approved by the Government." Rodriguez and King's Compl. ¶ 21.

Rodriguez and King filed their complaint under seal and served a copy on the United States Government in accordance with the requirements of the False Claims Act. 31 U.S.C. § 3730(b)(2). In February 2006, the Government declined to intervene in the case and the District Court ordered the complaint unsealed. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, No. 06-0129, 2006 WL 3193838, at *1 (D.N.J. Nov. 1, 2006). In May 2006, the Medical Center made a motion to dismiss the complaint under either Federal Rule of Civil Procedure 12(b)(6) or 9(b), contending that the complaint neither stated a *prima facie* case under the False Claims Act nor complied with the heightened pleading requirements that apply to allegations of fraud. On November 1, 2006, the District Court granted the motion to dismiss under Rule 12(b)(6). *Rodriguez*, 2006 WL 3193838, at *2. Rodriguez and King filed a notice of appeal on December 27, 2006, 56 days later.

II. Jurisdiction

Before we can reach the merits, we must determine whether Rodriguez and King's appeal was timely.[4] *See Benn v. First Judicial Dist. of Pennsylvania*, 426 F.3d 233, 237 (3d Cir. 2005) ("Compliance

[4] The District Court had jurisdiction under 28 U.S.C. § 1331.

with the Rules of Appellate Procedure for proper filing of a notice of appeal is mandatory and jurisdictional.") (internal quotation marks omitted). The timeliness of a notice of appeal is governed by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. This provides in pertinent part:

> (A) In a civil case, except as provided in Rule[ ] 4(a)(1)(B), . . . the notice of appeal . . . must be filed . . . within 30 days after the judgment or order appealed from is entered.
>
> (B) When the United States . . . is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

Fed. R. App. P. 4(a)(1)(A), (B). Because the notice of appeal here was filed 56 days after the District Court's entry of judgment, its timeliness hinges on whether the United States still counts as a "party" to a private False Claims Act action for Rule 4(a)(1) purposes when it initially declines to intervene.

This is an issue of first impression for our Court and one over which courts of appeals have split. The Courts of Appeals for the Fifth, Seventh and Ninth Circuits apply the 60-day deadline under these circumstances. *See United States ex rel. Lu v. Ou,* 368 F.3d 773 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.,* 98 F.3d 1100 (9th Cir. 1996). The Courts of Appeals for the Second and Tenth Circuits apply

the 30-day deadline. *See United States ex rel. Eisenstein v. City of New York,* 540 F.3d 94 (2d Cir. 2008); *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy,* 588 F.2d 1327 (10th Cir. 1978) (*per curiam*).

What makes this issue difficult is the neither fish nor fowl nature of the Government's relationship to a *qui tam* action under the False Claims Act.[5] The Act empowers a private litigant to bring an action "in the name of the Government." 31 U.S.C. § 3730(b)(1). The private litigant must initially serve the complaint on the Government under seal. § 3730(b)(2). The Government then has 60 days to determine whether to "proceed with the action, in which case the action shall be conducted by [it]," or else decline to do so, "in which case the person bringing the action shall have the right to conduct the action." § 3730(b)(4)(A), (B).

Even when the Government declines to intervene initially, it still retains the right to continue involvement in the case in various ways. It may require that it "be served with copies of all pleadings filed in the action," and may, upon a showing of "good cause," intervene in the action "at a later date." § 3730(c)(3). Indeed, in this case, the Government, in declining to take over the action, requested specifically that it be served with all pleadings and sent all Orders issued

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[5] While not all *qui tam* actions are brought under the False Claims Act, it is by far the most frequently used of those laws that allow for such actions. *See Stevens,* 529 U.S. at 768.

by the Court, and noted that it reserved the right to intervene at a later date for good cause. Moreover, should the private False Claims Act suit succeed, the Government is entitled to at least 70% of the award. § 3730(d)(2). Finally, although this Court has not yet ruled on the matter, most courts have held that the Government retains the right to veto any settlement agreement reached by a private False Claims Act plaintiff. *See United States ex rel. Ridenour v. Kaiser-Hill Co., LLC,* 397 F.3d 925, 931 n.8 (10th Cir. 2005); *United States ex rel. Doyle v. Health Possibilities, P.S.C.,* 207 F.3d 335, 339 (6th Cir. 2000); *Searcy v. Philips Elecs. N. Am. Corp.,* 117 F.3d 154, 159-160 (5th Cir. 1997). *But see United States ex rel. Killingsworth v. Northrop Corp.,* 25 F.3d 715, 722 (9th Cir. 1994) (holding that the Government's right to prevent a private plaintiff from dismissing a False Claims Act suit without its consent only applies during the initial 60-day period during which the Government can elect to take over the action).

The question we face, then, is whether all of this is enough to make the United States a "party" for Rule 4(a)(1) purposes, even when it has initially conceded to a private party "the right to conduct the action." § 3730(b)(4)(B). In answering this question, we do not find it dispositive to dwell on the meaning of the word "party." On the one hand, the United States' "name is on all the papers as the plaintiff," *Haycock,* 98 F.3d at 1102, which certainly makes it look like a party to the action, as does the fact that it stands to receive the bulk of any award obtained,

§ 3730(d)(2). On the other hand, as the Court of Appeals for the Second Circuit has noted, "[t]he inability to participate without moving to intervene is . . . not consistent with the principal characteristics of being a party to litigation." *Eisenstein,* 540 F.3d at 98; *see also Petrofsky,* 588 F.2d at 1329 (stating that a *qui tam* plaintiff's proceeding in the name of the United States is "merely a statutory formality").

We do, however, join our colleagues in the Fifth, Seventh and Ninth Circuits in finding significant that, even when it declines to intervene, the United States remains a party to a *qui tam* action in the literal sense, *i.e.,* its name is on the caption. *See Ou,* 368 F.3d at 775; *Russell,* 193 F.3d at 307-08; *Haycock,* 98 F.3d at 1102. Applying the shorter deadline may confuse litigants who, based on a literal reading on Rule 4(a)(1), assume that the longer deadline applies. It is especially important, when interpreting procedural rules, that we avoid any reading likely to cause confusion. *See* Fed. R. Civ. P. 1 (requiring that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"); *Russell,* 193 F.3d at 308 (reading Rule 1 of the Federal Rules of Civil Procedure as "a charge to resist reading the Rules in a manner that lays traps for the unwary"). Thus, considerations of clarity for litigants cut in favor of applying the longer deadline. *See Ou,* 368 F.3d at 775; *Russell,* 193 F.3d at 307-08; *Haycock,* 98 F.3d at 1102; *Petrofsky,* 588 F.2d at 1329 (Logan, J., dissenting).

In addition, the purpose underlying granting a longer deadline when the United States is a party favors applying the longer deadline under these circumstances. As the *Russell* Court explained, the purpose of the extra time is to accommodate the relative slowness of the "[G]overnment's institutional decisionmaking practices." 193 F.3d at 306 (citing the Advisory Committee's Notes of 1946 to Federal Rule of Civil Procedure 73(a), the predecessor to Federal Rule of Appellate Procedure 4(a)). The *Eisenstein* Court reasoned that this suggests that the 30-day deadline is appropriate in this context, since, when the Government is not actually controlling the litigation, its status as a slow-moving institutional actor need not be taken into account. 540 F.3d at 99. This ignores that, even when it initially declines to take over the case, the Government still retains the right to intervene in the action, albeit upon a showing of "good cause." 31 U.S.C. § 3730(c)(3). Accordingly, when a private litigant loses a False Claims Act suit at the district court, the Government retains the right to move to appeal. *See Searcy,* 117 F.3d at 157 (holding that the Government can appeal an adverse decision even without formally intervening under § 3730(c)(3)). That means that the slowness of the Government continues to be relevant to determining how long the right to appeal should remain available.

In sum, we hold that Rule 4(a)(1)(B)'s 60-day deadline for filing a notice of appeal applies to False Claims Act suits even when the Government declines to intervene. Accordingly, Rodriguez and King's notice

of appeal was timely, and we have jurisdiction over the appeal under 28 U.S.C. § 1291.

III. Standard of Review

We review *de novo* a district court's dismissal of an action under Federal Rule of Civil Procedure 12(b)(6). *Phillips v. County of Allegheny,* 515 F.3d 224, 230 (3d Cir. 2008). As such, we will uphold the District Court's dismissal only if, accepting "all well pleaded factual allegations as true and draw[ing] all reasonable inferences from such allegations in favor of the complainant," it is clear that Rodriguez and King cannot prove a set of facts that would entitle them to relief. *Worldcom, Inc. v. Graphnet, Inc.,* 343 F.3d 651, 653 (3d Cir. 2003). Because our review is *de novo,* we may affirm the District Court's order on alternate grounds. *See In re Paoli R.R. Yard PCB Litig.,* 221 F.3d 449, 461 (3d Cir. 2000) (explaining the nature of *de novo* review).

IV. Discussion

The False Claims Act imposes liability on any entity who

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]

> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government. . . .

31 U.S.C. § 3729(a)(1), (2). The District Court held that Rodriguez and King "failed to allege that [the Medical Center] violated [the False Claims Act] on the face of the complaint." *Rodriguez,* 2006 WL 3193838, at *2. The basis for this conclusion was, presumably, that while the complaint alleged that Bergan Lanning received federal funding, it did not describe any actual instances of false claims being submitted.

Rodriguez and King argue that they were not required to assert any specific false claim submissions because their complaint proceeded under a "false certification" theory of False Claims Act liability. Under that theory, an entity is liable for falsely representing itself as having complied with applicable regulations in connection with the receipt of federal funds. *See United States ex rel. Quinn v. Omnicare Inc.,* 382 F.3d 432, 441 (3d Cir. 2004). Under the most expansive version of this theory – the "implied false certification theory" version – liability can attach even when the entity receiving funds has not expressly certified that it complied with the regulations it violated; all that is required is that the entity has received payment from the Government without disclosing that it has violated regulations that affect its eligibility for payment. *See id.* at 441-42; *United States ex rel. Mikes v. Straus,* 274 F.3d 687, 699 (2d

Cir. 2001). That is Rodriguez and King's theory here – that the Medical Center submitted claims for payment to the federal Government while at the same time violating, without disclosing, applicable rules with respect to the dispensing of prescription drugs.

The District Court declined to address Rodriguez and King's false certification argument, concluding that it was first raised in their Reply to the Medical Center's motion to dismiss, not in their pleadings, and thus could not be considered in addressing a Rule 12(b)(6) motion. *Rodriguez,* 2006 WL 3193838, at *2. That was not a generous reading of Rodriguez and King's complaint. The complaint did assert that "[t]he practice of allowing non-licensed individuals who only ha[ve] a degree in social work to dispense drugs in violation of [New Jersey law] constitutes a false certification, record or statement to get a claim paid or approved by the Government." Rodriguez and King's Compl. ¶ 21. That was plausibly sufficient to invoke the false certification theory.

But even granting that Rodriguez and King's complaint asserted a false certification theory of False Claims Act liability, the District Court's dismissal was nonetheless appropriate. Our Court has yet to adopt in a holding the false certification theory, either in its express or implied version.[6] *Quinn,* 382

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[6] While *Quinn* included an extensive discussion of the false certification theory of False Claims Act liability, it did not explicitly adopt it. 382 F.3d at 441-43. Rather, it held that, even assuming the applicability of that theory, the plaintiff could not

(Continued on following page)

F.3d at 441. Yet again we can avoid this issue, for even were we to adopt the implied false certification theory here it would not affect the disposition of this case. That is because Rodriguez and King's complaint failed to assert the elements necessary to succeed under that theory.

What Rodriguez and King argue is that by alleging *both* that Bergan Lanning receives federal funding *and* that, at various times, pharmaceuticals have been dispensed by Bergan Lanning employees who are not licensed to do so under New Jersey law, they adequately pled a False Claims Act violation under an implied false certification theory. But that is incorrect. To state a claim under that theory it is necessary to allege not only a receipt of federal funds and a failure to comply with applicable regulations, but also that payment of the federal funds was in some way conditioned on compliance with those regulations. *See Quinn,* 382 F.3d at 441; *Mikes,* 274 F.3d at 697; *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.,* 214 F.3d 1372, 1376 (D.C. Cir. 2000). Otherwise, the False Claims Act would be turned into "a blunt instrument to enforce compliance with all . . . regulations" rather than "only those regulations that are a precondition to payment." *Mikes,* 274 F.3d at 699.

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prevail under it because he did not show that the specific drugs dispensed contrary to applicable regulations had been paid for by the Government. *Id.* at 443.

Rodriguez and King argue that our Court weakened this requirement in *Quinn*. It is true that in *Quinn* we expressed approval, in *dicta*, for the plaintiff's argument that "a finding of [False Claims Act] liability, based on an implied certification theory, should not be limited to situations where the underlying regulation or statute expressly states that compliance is a condition of payment." 382 F.3d at 432. Nonetheless, we still indicated that a plaintiff must show that the alleged violations would be relevant to "the [G]overnment's disbursement decisions." *Id.* at 433 (quoting *Mikes*, 274 F.3d at 697).

That is what is missing from Rodriguez and King's complaint – any suggestion that Bergan Lanning's alleged receipt of federal funds was linked to compliance with New Jersey law regulating eligibility to dispense prescription drugs. Without that step, we hold that there can be no False Claims Act liability for the Medical Center, even assuming that prescriptions were filled at Bergan Lanning by persons not eligible to do so. In their brief, Rodriguez and King contend that "it is axiomatic that [the Medical Center] in connection with its grant submission and seeking Medicaid reimbursement must certify . . . , whether it be express or implied, that it is complying with the New Jersey Pharmacy Act and Regulations in connection with the provision of the pharmaceutical services specified under the Act." Rodriguez and King's Br. 5-6. But they were required to spell out that connection in their complaint, rather

than relying on the Court to find it. Accordingly, dismissal under Rule 12(b)(6) was warranted.

V. Conclusion

Rodriguez and King's appeal was timely, as we hold a 60-day appeal period exists in this case. However, as their complaint failed to assert a link between the Medical Center's alleged regulatory violations and its receipt of Government funds, it did not state a violation of the False Claims Act. We therefore affirm the District Court's dismissal of the suit.

AMICUS CURIAE BRIEF

No. 08-660

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
IRWIN EISENSTEIN

v.

CITY OF NEW YORK, NEW YORK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Under Federal Rule of Appellate Procedure 4(a)(1)(A), a notice of appeal in a federal civil action generally must be filed within 30 days after the entry of the judgment or order from which the appeal is taken. If the United States is a "party" to the suit, however, Rule 4(a)(1)(B) provides that the notice of appeal may be filed within 60 days after entry of the relevant judgment or order. The question presented is as follows:

Whether, when the government declines to intervene or otherwise actively participate in a *qui tam* action under the False Claims Act, the United States is a "party" to the suit for purposes of Rule 4(a)(1)(B).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves a *qui tam* suit under the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.* The FCA is the primary mechanism by which the federal government recoups losses suffered through fraud, and the determination whether the government is a "party" to a *qui tam* action in which it has declined to intervene or otherwise actively participate may affect the nature of the government's obligations in such suits. The United States therefore has a substantial interest in the Court's resolution of the question presented in this case.

STATEMENT

1. As amended, the FCA imposes civil liability upon "[a]ny person" who, *inter alia*, "knowingly presents, or

causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). A person who is found to have violated the FCA is liable for civil penalties "plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a).

An action under the FCA may be commenced in either of two ways. First, the government itself may bring a civil action against the alleged false claimant. 31 U.S.C. 3730(a). Second, a private person (known as a relator) may bring a *qui tam* civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). In that event, "[t]he action shall be brought in the name of the Government." *Ibid.*

If a relator brings a *qui tam* action, the complaint is filed in camera and remains under seal for at least 60 days. 31 U.S.C. 3730(b)(2). The complaint "shall not be served on the defendant until the court so orders," *ibid.*, and "[t]he defendant shall not be required to respond to any complaint filed under [Section 3730] until 20 days after the complaint is unsealed and served upon the defendant," 31 U.S.C. 3730(b)(3). In addition to filing the complaint under seal, the relator must serve a copy of the complaint and any supporting evidence on the government. 31 U.S.C. 3730(b)(2).

Within 60 days after receiving the complaint and supporting evidence, the government may elect either "to intervene and proceed with the action," 31 U.S.C. 3730(b)(2), or to "notify the court that it declines to take over the action," 31 U.S.C. 3730(b)(4). The 60-day period may be extended "for good cause shown" on motion by the government. 31 U.S.C. 3730(b)(3). If the government elects to intervene, it "shall have the primary re-

sponsibility for prosecuting the action, and shall not be bound" by any act of the relator. 31 U.S.C. 3730(c)(1). The relator may continue as a party to the action, *ibid.*, however, and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement, 31 U.S.C. 3730(c)(2)(A)-(B). If the government declines to intervene, the relator has the exclusive right to conduct the action. See 31 U.S.C. 3730(b)(4)(B), (b)(5), and (c)(3).

If the government intervenes and the suit ultimately produces a monetary recovery, the relator is generally entitled to between 15 and 25 percent of the proceeds. 31 U.S.C. 3730(d)(1). If the government declines to intervene and the relator successfully prosecutes the action, the relator receives between 25 and 30 percent of the recovery. 31 U.S.C. 3730(d)(2).

2. Federal Rule of Appellate Procedure 4(a) establishes the deadlines for filing a notice of appeal in a federal civil action. Under Rule 4(a)(1)(A), the notice of appeal generally must be filed within 30 days after the entry of the judgment or order from which the appeal is taken. "When the United States or its officer or agency is a party" to the suit, however, "the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(B). The timing requirements set forth in Rule 4(a)(1)(A) and (B) largely track the provisions of 28 U.S.C. 2107(a) and (b).

3. This case involves a *qui tam* suit filed by petitioner Irwin Eisenstein against respondents, the City of New York and Michael Bloomberg. Petitioner alleged that respondents had violated federal and state law by requiring non-resident City employees to pay a fee equivalent to the municipal income taxes paid by resi-

dent City employees. J.A. 27-31. Petitioner asserted that imposition of the fee on non-resident City employees violated the FCA because those employees are able to deduct the fee as an expense for federal income tax purposes, thereby depriving the federal government of tax revenue. J.A. 38, 41-42.

As required by the FCA, see 31 U.S.C. 3730(b)(2), petitioner's complaint was filed under seal and was not served upon respondents. J.A. 1. The United States declined to intervene to take over the action, J.A. 46, but requested service of all pleadings and reserved its rights to order any deposition transcripts and to move to intervene for good cause at a later date, J.A. 47. After declining to intervene, the United States had no involvement in the case at any point before the district court.

Petitioner's complaint was unsealed and served on respondents. J.A. 1-2, 49-50. Respondents subsequently moved to dismiss the complaint for failure to state a claim. J.A. 3. On March 30, 2006, the district court granted respondents' motion to dismiss. Pet. App. 16a-43a. On April 12, 2006, the district court entered judgment in respondents' favor. J.A. 5. On June 5, 2006, 54 days after the entry of judgment, petitioner filed his notice of appeal. J.A. 6, 51-55.

4. a. The court of appeals *sua sponte* ordered the parties to brief whether the 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) or the 60-day time limit in Rule 4(a)(1)(B) "applies to a *qui tam* action where the United States declines to intervene in the proceedings." J.A. 57. Petitioner and respondents filed briefs on that issue, at which time respondents also moved to dismiss the appeal in part for lack of jurisdiction. J.A. 11-12. The court of appeals subsequently appointed counsel for petitioner, J.A. 14, and the parties

then submitted additional briefs addressing both the motion to dismiss and the merits of the appeal, J.A. 16-18. At that point, the United States filed a brief as amicus curiae in support of respondents' motion to dismiss, without addressing the merits of the appeal. J.A. 18.

b. The court of appeals granted respondents' motion to dismiss the appeal. Pet. App. 1a-15a. The court held that "the United States is not a 'party' * * * for the purposes of the deadline for filing a notice of appeal" when it "fails to intervene or to raise or resist any legal claim." *Id.* at 7a. The court rejected petitioner's argument that, because the government is a real party in interest to a declined *qui tam* suit, it is a "party" to such an action within the meaning of Federal Rule of Appellate Procedure 4(a)(1)(B). *Id.* at 8a-10a. The court also explained that the 60-day filing period under Rule 4(a)(1)(B) serves to accommodate the government's internal processes for deciding whether an appeal should be taken in cases where it is a potential appellant, and the court found that rationale to be inapplicable to the present case. *Id.* at 10a-11a. While acknowledging that other circuits had reached a contrary conclusion, the court "d[id] not agree that a 'literal' reading of Rule 4(a) accords a 60-day filing period to private individuals who bring suit in the name of the United States." *Id.* at 13a-14a. The court was also unpersuaded that its reading of Rule 4(a) was likely to produce confusion among attorneys responsible for filing notices of appeal in similar cases in the future. *Id.* at 14a.

SUMMARY OF ARGUMENT

1. a. The United States is typically not a party to a *qui tam* action for purposes of Rule 4(a)(1)(B) where, as here, it declines to intervene. Intervention is the standard mechanism by which a nonparty becomes a party to a civil action. The FCA authorizes the government either to intervene in a *qui tam* suit or to decline to do so. The statute thus indicates both that the mere filing of a *qui tam* suit is insufficient to make the government a party to the action and that the government should be allowed to choose whether it will become a party. Congress's reliance on the ordinary understanding of intervention is confirmed by other aspects of the FCA's text and history.

b. Although intervention is the usual means by which the government becomes a party to a *qui tam* suit, the government may also become a party by exercising certain rights expressly granted by the FCA to direct the disposition of the litigation over the relator's objection. In this case, however, the government did not exercise those prerogatives or actively participate in any way during the district court proceedings. This case therefore does not present the question under precisely what circumstances the United States may decline to intervene in a *qui tam* suit yet nevertheless become a party for purposes of Rule 4(a)(1)(B) through subsequent participation before the district court.

2. a. Contrary to petitioner's contention, the purposes of Rule 4(a)(1)(B) are not implicated here. The reason for allowing 60 days to appeal when the government is a party is that its institutional decisionmaking processes take more time than those of private litigants. The government does not conduct those processes in *qui*

tam suits in which it has neither intervened nor exercised its statutory rights to direct the litigation.

b. The status of the United States as a real party in interest in a declined *qui tam* suit is likewise insufficient to make it a "party" within the meaning of Rule 4(a)(1)(B). Petitioner brought this action as the partial assignee of the government's damages claim. Both petitioner and the government are therefore real parties in interest, and either could have brought suit to enforce the claim. The government did not bring the action, however, and it neither intervened nor actively participated before the district court. Petitioner therefore is the only party-plaintiff to this action, even though the government's entitlement to the bulk of any recovery gives it a practical stake in the outcome of the suit.

c. Petitioner is also incorrect in arguing that, because a *qui tam* suit is required to be brought in the name of the government, the United States is a "party" to the case within the meaning of Rule 4(a)(1)(B). Captions are not determinative of party status. In any event, petitioner's caption identifies the government not as a party-plaintiff but as an entity on whose behalf the action is brought. And whatever the probative value of the FCA's naming requirement, it is outweighed by competing inferences from the remainder of the FCA.

d. Finally, petitioner is incorrect in contending that the need for clarity favors a 60-day filing period. If this Court concludes that the relevant FCA provisions are better read not to make the United States a "party" to this declined *qui tam* action within the meaning of Rule 4(a)(1)(B), it will resolve any ambiguity that now exists, and future litigants will note and follow the Court's decision. That is particularly so because relators may not litigate *pro se* under the FCA.

ARGUMENT

I. THE UNITED STATES IS NOT A "PARTY" TO THIS CASE WITHIN THE MEANING OF FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(1)(B) BECAUSE THE GOVERNMENT DECLINED TO INTERVENE AND DID NOT OTHERWISE ACTIVELY PARTICIPATE BEFORE THE DISTRICT COURT

Under 28 U.S.C. 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), the notice of appeal in a federal civil case generally must be filed within 30 days after the judgment or order from which the appeal is taken. When the United States or a federal officer or agency is a "party" to the case, however, the time limit for all parties to file a notice of appeal is 60 days rather than 30 days. See 28 U.S.C. 2107(b); Fed. R. App. P. 4(a)(1)(B). Neither Section 2107 nor Rule 4 defines the term "party" for purposes of those provisions. For that reason, in determining party status for appellate purposes, this Court has looked to whether and how the putative party participated in the action before the district court. See, *e.g.*, *Lance* v. *Dennis*, 546 U.S. 459, 465 (2006) (per curiam); *Devlin* v. *Scardelletti*, 536 U.S. 1, 8-9 (2002); *Marino* v. *Ortiz*, 484 U.S. 301, 303-304 (1988) (per curiam).

Those decisions make clear that a nonparty may become a party to a civil action in one of two ways: (i) by invoking formal procedural mechanisms like intervention, substitution, or third-party practice, see, *e.g.*, *Marino*, 484 U.S. at 303-304 (nonparties who objected to settlement but did not intervene could not appeal); or (ii) by participating in the action in a manner and to a degree that justifies treatment as a party, see, *e.g.*, *Devlin*, 536 U.S. at 10-11 (nonnamed class members who

objected to settlement but did not intervene could nevertheless appeal).

When the government exercises its right under the FCA to intervene and assume control of a *qui tam* action, it acquires the status of a "party" to the suit for purposes of, *inter alia*, 28 U.S.C. 2107(b) and Rule 4(a)(1)(B). Even without formal intervention, the government may in rare circumstances become a party to a declined *qui tam* action by asserting particular rights under the FCA to direct the disposition of the suit. But where, as here, the government neither intervenes in a *qui tam* suit nor otherwise actively participates in the proceedings before the district court, it is not a "party" for purposes of Section 2107(b) and Rule 4(a)(1)(B).

A. Where, As Here, The United States Elects Not To Intervene In A *Qui Tam* Suit Brought Under The FCA, It Generally Declines To Assume Both The Rights And Obligations Of Party Status

1. The Federal Rules of Civil Procedure establish various procedural mechanisms by which a nonparty can become a party to a civil action. The most commonly used of those mechanisms is intervention under Federal Rule of Civil Procedure 24. The purpose of intervention is to allow a nonparty to a civil action to come into the action as a party and participate as such alongside the original parties. See *Karcher* v. *May*, 484 U.S. 72, 77 (1987) ("One who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice."); 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1901, at 257 (3d ed. 2007) (*Wright*) (defining "[i]ntervention" as "a procedure by which an outsider with an interest in a

lawsuit may come in as a party though the outsider has not been named as a party by the existing litigants").

Intervention under the FCA serves a similar purpose. When a relator brings a *qui tam* action, he must file the complaint under seal and refrain from serving it upon the defendant for at least 60 days. 31 U.S.C 3730(b)(2). The relator also must serve a copy of the complaint and any supporting evidence on the government. *Ibid.* At that point, the government "may elect to intervene and proceed with the action" before the complaint is unsealed and served upon the defendant. *Ibid.* Although the government may move to extend the time during which the complaint remains under seal, 31 U.S.C. 3730(b)(3), "[b]efore the expiration of the 60-day period or any extensions" it must make a choice: either "proceed with the action, in which case the action shall be conducted by the Government," or "notify the court that it declines to take over the action, in which case the [relator] shall have the right to conduct the action," 31 U.S.C. 3730(b)(4)(A) and (B). Through the procedural mechanism of intervention, Congress gave the Executive an option in FCA actions: intervene as a party-plaintiff and direct the litigation, or remain as a nonparty and allow the relator to conduct the suit.

The government's ability to choose whether to intervene in particular *qui tam* actions is crucial to ensure that such suits do not impose unmanageable burdens on federal personnel. If the United States were treated as a "party" to all *qui tam* suits for purposes of the Federal Rules generally, the government would be subject to substantial litigation burdens, most notably the requirements governing party discovery imposed by Federal Rules of Civil Procedure 26-37, simply as a result of private relators' decisions to initiate *qui tam* actions. The

FCA provisions governing intervention by the United States ensure that federal attorneys can decide, in each *qui tam* suit, whether the United States will assume the combination of advantages and disadvantages that party status entails.[1]

2. Because intervention is the typical process by which a nonparty becomes a party to a lawsuit, the FCA's authorization for the government "to intervene" in a *qui tam* action, 31 U.S.C. 3730(b)(2) and (c)(3), would be superfluous if the government were already a party to the suit. The FCA's intervention provisions thus demonstrate that the mere filing of a *qui tam* action is not sufficient to vest the United States with party status. See, *e.g.*, *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."). The inference that Congress employed the word "intervene" in its usual sense is particularly strong because that word is a legal term of art with an established legal meaning. See Fed. R. Civ. P. 24. "[W]here Congress borrows terms of art" with an established legal meaning, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."

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[1] For purposes of the discovery obligations imposed by the Federal Rules of Civil Procedure, the government's decision whether to intervene in an FCA *qui tam* suit is not an all-or-nothing choice. Relators often file *qui tam* complaints that assert multifarious claims, sometimes against a number of defendants. In those circumstances, the government sometimes intervenes to take over the conduct of the suit only with respect to some claims or some defendants, leaving the remaining claims to be prosecuted by the relator. When the government elects that option, it is properly regarded as a "party" for discovery purposes only with respect to the claims as to which it has assumed control over the litigation.

Morissette v. *United States*, 342 U.S. 246, 263 (1952); *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't. of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring).

The history of the FCA confirms that Congress employed the term "intervene" in its customary and usual sense. As originally enacted in 1863, the FCA did not permit the government to assume control of the relator's action. See FCA, ch. 67, 12 Stat. 696; *United States* v. *Griswold*, 30 F. 762 (C.C.D. Or. 1887). That was true even though then, as now, the relator brought suit "for himself as for the United States" and the suit was required to be brought "in the name of the United States." FCA, Rev. Stat. § 3491 (1878). Once a relator commenced his action, the government was powerless to interfere with its prosecution, *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 546-547 (1943), although the government's consent was a prerequisite to dismissal of the suit, Rev. Stat. § 3491 (1878).

To increase the government's level of control over FCA litigation, Congress amended the Act in 1943 to provide that "[t]he Government may proceed with the action by entering an appearance by the 60th day after being notified" of the filing of the complaint. 31 U.S.C. 3730(b)(2) (1982). The amended statute provided that if the government "within said period shall enter appearance in such suit the same shall be carried on solely by the United States." 31 U.S.C. 232(C) (1976). If, however, the government either failed to enter an appearance or else entered but then failed to proceed, the relator could "carry on such suit." 31 U.S.C. 232(D) (1976). Either way, only one party could pursue the action: the government or the relator.

When it again amended the FCA in 1986, Congress substantially overhauled the Act's *qui tam* provisions. As explained above, the statute in its current form authorizes the government "to intervene and proceed with the action" at its outset, 31 U.S.C. 3730(b)(2), or "to intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). Unlike the 1943 version of the statute, however, the FCA now allows the relator "to continue as a party to the action," 31 U.S.C. 3730(c)(1), even in cases in which the government has exercised its right to assume control over the litigation. Use of the term "intervene" in the current FCA is thus particularly apt because the government's participation as a party supplements, rather than displaces, the relator as a party to the action.

3. Congress's understanding of intervention as the typical process by which the government becomes a party to a *qui tam* action is confirmed by related provisions of law. See, *e.g.*, *Davis* v. *Michigan Dep't. of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Under the 1986 amendments to the FCA, even when the government elects not to intervene in a *qui tam* action, it may request to "be served with copies of all pleadings filed in the action." 31 U.S.C. 3730(c)(3). That provision would be superfluous if the government were already a party to the action, because Federal Rule of Civil Procedure 5 requires service on "every party [of] a pleading filed after the original complaint." Fed. R. Civ. P. 5(a)(1)(B); see Fed. R. Civ. P. 5(a) (1986) (requiring that "every pleading subsequent to the original complaint * * * be served upon each of the parties"). This Court ordinarily

attempts to avoid rendering statutory provisions superfluous, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001), and presumes that Congress is aware of the legal backdrop against which it acts, *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-697 (1979).

Federal Rule of Civil Procedure 24, which governs intervention in civil actions generally, likewise presumes that putative intervenors are not already parties to the action. Rule 24(a), which governs intervention of right, allows intervention in certain circumstances only if "existing parties" do not adequately represent "the movant's * * * interest." Fed. R. Civ. P. 24(a)(2). And Rule 24(b), which governs permissive intervention, allows intervention only if it would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Moreover, Rule 24(b) specifically permits a federal officer or agency to intervene only "if a party's claim or defense" is founded upon federal law administered by that officer or agency. Fed. R. Civ. P. 24(b)(2). Both mandatory and permissive intervention reflect the assumption that those who move to intervene in a pending case, including government officers and agencies, are not themselves parties to the action.

Petitioner contends that intervention is not a proper test of party status because, "even after declination, the Government's presence in a *qui tam* action is pervasive." Br. 19. That contention overstates the government's role. To be sure, the government has significant prerogatives under the FCA even after it has initially declined to intervene. Those include the right "to intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3); the right to object to the relator's settlement and voluntary dismissal of the suit, see 31 U.S.C.

3730(b)(1); the right to dismiss a case over the relator's objection, see 31 U.S.C. 3730(c)(2)(A); and the right to seek a stay of the relator's discovery, see 31 U.S.C. 3730(c)(4). The government may also request the pleadings and deposition transcripts, see 31 U.S.C. 3730(c)(3), which ensures that federal personnel can monitor the suit in order to decide whether the government should exercise its other rights under the FCA.

Merely monitoring the pleadings and transcripts in an FCA case, however, is not the sort of active participation that is ordinarily associated with party status. And unless and until the government actually exercises its more substantive prerogatives in a particular case, their mere availability is likewise insufficient to make the United States a party to the suit. The statute's conferral of the rights described provides no sound reason to deprive the intervention decision of its ordinary effect. Those rights may indicate that "[t]he Government's role" in a declined *qui tam* action "is *sui generis*," Pet. Br. 27 n.17, but they do not transform a monitor into a participant or an observer into a party.

B. The FCA Allows The United States To Become A Party By Exercising Its Rights To Participate

1. For the reasons set forth above, when the government declines to intervene at the outset of a *qui tam* suit, and does not seek leave to intervene at a later stage, the usual inference is that the government has chosen to forgo the benefits and to avoid the burdens that party status would entail. This Court has recognized, however, that a nonparty may become a party to a civil action for at least some purposes by participating in a manner and to a degree that justifies treatment as a party, even when it does not invoke a formal proce-

dural mechanism like intervention. See *Devlin*, 536 U.S. at 10-11; *Blossom* v. *Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1864).

The present case does not require the Court to apply that principle to the FCA context or to identify the precise circumstances under which the government might become a party to a declined *qui tam* action without formally intervening. See *Keene Corp.* v. *United States*, 508 U.S. 200, 212 n.6 (1993) ("Because the issue is not presented on the facts of this case, we need not decide [it]."). In this case, the government filed a standard notice that it had elected to decline intervention, J.A. 46-48, and it did not participate thereafter in the proceedings before the district court, J.A. 1-8. Thus, unless the Court agrees with petitioner's contention that the United States is a "party" to *every* declined *qui tam* action for purposes of Rule 4(a)(1)(B), the judgment of the court of appeals should be affirmed, since the government undertook no form of active participation here.

2. Although this Court need not decide what types of participation by the government in a declined *qui tam* action might warrant treatment as a party, it should not announce a categorical rule that intervention is the only means by which the government can become a party to such a case. In rare circumstances, the government can become a party to a declined *qui tam* action, even without formal intervention, by asserting its rights under the FCA to direct the disposition of the lawsuit. The FCA authorizes the government to dismiss a *qui tam* action notwithstanding the relator's objection, see 31 U.S.C. 3730(c)(2)(A), and to veto a proposed settlement and voluntary dismissal of the suit, 31 U.S.C. 3730(b)(1).

The statute does not make intervention a prerequisite to the exercise of those prerogatives.[2]

When it invokes those statutory powers, the government requests action from the district court that is adverse to the relator, indicating that the government is no longer content to accept the relator as its representative. In requesting such action, moreover, the government does not merely advise the district court as to the proper construction of applicable legal principles, but asserts statutory rights to direct the disposition of the litigation.[3] Contrary to petitioner's contention (Br. 28-

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[2] To be sure, nothing in the FCA *precludes* the government from intervening in a *qui tam* action when it seeks to dismiss the suit over the relator's objection or to veto a proposed settlement and voluntary dismissal. Once the government has made an initial election "not to proceed with the action," however, it has no unqualified *right* to intervene at a later stage of the case; rather, the district court may "permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). Because the government's authority to dismiss a *qui tam* action, see 31 U.S.C. 3730(c)(2)(A), or to veto a settlement and voluntary dismissal, see 31 U.S.C. 3730(b)(1), is not similarly contingent upon the permission of the district court, the structure of the FCA as a whole suggests that intervention is not a prerequisite to the exercise of those prerogatives. In addition, by authorizing the government "to intervene and proceed with the action," 31 U.S.C. 3730(b)(2), the FCA suggests that the usual consequence of intervention is that the government will thereafter prosecute the suit.

[3] The government's status as a party in such circumstances may make no difference to the timeliness of an appeal. When the government asks the district court to grant or deny a motion to dismiss, 31 U.S.C. 3730(b)(1) and (c)(2)(A), or to approve a settlement, 31 U.S.C. 3730(c)(2)(B), appeal is generally taken from the collateral order resolving that issue (to which the government would be a party, see *Devlin*, 536 U.S. at 9-10; *id.* at 16-17 (Scalia, J., dissenting)), rather than from a judgment on the merits. A court therefore may never have reason to determine whether the government is a party when it exercises such statutory rights.

30), treating the government as a party in those two narrow circumstances, where the United States has sought to exercise an express statutory right to direct the disposition of a *qui tam* action over the relator's objection, would create no meaningful uncertainty concerning the application of Rule 4(a)(1)(B) to declined *qui tam* suits generally.[4]

3. That position is consistent with the government's appeal in *Searcy* v. *Philips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997). In *Searcy*, the government initially declined to intervene in a *qui tam* action, but subsequently objected to a proposed settlement between the relator and the defendant, see 31 U.S.C. 3730(b)(1), without first seeking leave to intervene for good cause, see 31 U.S.C. 3730(c)(3). *Searcy*, 117 F.3d at 155. The district court approved the settlement, and the government then sought to appeal. *Id.* at 155-156. In the Fifth Circuit, the relator contended that the government was not a proper appellant because it had not intervened at any point. *Id.* at 156.

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[4] When a nonparty to a lawsuit requests a ruling on a matter collateral to the merits of the litigation, he may be entitled to appeal a judicial order denying that request, even though he is not a party to the suit as a whole and would not be entitled to appeal a final judgment. See *Devlin*, 536 U.S. at 16-17 (Scalia, J., dissenting) (discussing cases); note 3, *supra*. Under the FCA, the government has certain statutory prerogatives that do not involve directing the disposition of the lawsuit, such as the authority to move to extend the time during which the relator's complaint remains under seal, based on a showing of "good cause." 31 U.S.C. 3730(b)(3). If the government's motion to extend time were denied on an improper ground, the government would be a party entitled to appeal that collateral order (assuming that order was otherwise appealable), but the mere filing of an extension request would not make the government a party to the underlying action or any eventual judgment on the merits.

In response, the government argued that it was entitled to appeal because it was the "real party in interest" and "the real plaintiff" in the suit. Gov't Br. at 13, *Searcy*, *supra* (No. 96-40515) (quoting *United States ex rel. Milam* v. *University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48 (4th Cir. 1992)). The government further suggested that the United States should be regarded as a party for purposes of appeal in declined *qui tam* cases generally. See *id.* at 13-15. Although that argument was overbroad, the government also contended, and the Fifth Circuit correctly held, that the government was entitled to appeal in the circumstances of that case because it had opposed the settlement in the district court, as the FCA expressly authorized it to do. *Id.* at 15-20; see *Searcy*, 117 F.3d at 157-158. The Fifth Circuit concluded that "the district court was mistaken in determining that the government has no veto power" over a proposed settlement of a declined *qui tam* suit, and that "the government should be able to correct that error by raising its veto power in an appeal to this court, even if it chooses not to intervene." *Id.* at 157. The decision in *Searcy* is thus consistent with the government's current view that, although some affirmative choice by the government is necessary for the United States to become a party to a *qui tam* action, the government can acquire party status by asserting specific statutory rights under the FCA as well as by formally intervening.

II. PETITIONER'S ARGUMENTS THAT THE UNITED STATES IS A PARTY UNDER RULE 4 EVEN WHEN IT DECLINES TO INTERVENE OR PARTICIPATE LACK MERIT

A. The Purpose Of Rule 4(a)(1)(B) Is Not Implicated When The United States Neither Intervenes Nor Participates In The Action

Petitioner and his amici do not contend (Pet. Br. 36 n.27; Taxpayers Against Fraud (TAF) Br. 14 n.12) that the United States is a party for all purposes to a declined *qui tam* action. Indeed, petitioner expressly (and correctly) disavows the contention that the United States is subject, in a declined *qui tam* suit, to the discovery obligations imposed upon parties to litigation by Federal Rules of Civil Procedure 26-37. See Pet. Br. 36 n.27. Rather, petitioner and his amici contend that the United States is a "party" to a declined *qui tam* action within the meaning of Rule 4(a)(1)(B) even if it is not for other purposes a "party" to such a suit. That argument is misconceived.

It is certainly true that one can be a "party" to a lawsuit for some purposes and not others. See *Devlin*, 536 U.S. at 9-10. And if the purposes underlying Rule 4(a)(1)(B)'s extended time limit were directly and substantially implicated by declined *qui tam* suits, it might be appropriate to treat the United States as a "party" to such actions within the meaning of Rule 4(a)(1)(B), even though the government is not a "party" to such suits under other provisions of law. In fact, however, the rationale for Rule 4(a)(1)(B)'s longer time limit in federal-party cases is wholly inapplicable here.

Rule 4(a)(1)(B) allows 60 days to file a notice of appeal when the government is a party because "the gov-

ernment's institutional decisionmaking practices require more time to decide whether to appeal." *United States ex rel. Russell* v. *Epic Healthcare Mgmt. Group*, 193 F.3d 304, 306 (5th Cir. 1999). That rationale is clear from the Advisory Committee Notes accompanying Rule 4(a)(1)(B)'s predecessor, which are entitled to "weight" in interpreting the Rule. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315-316 (1988); *Schiavone* v. *Fortune*, 477 U.S. 21, 30-31 (1986). In adopting the 60-day period, the Committee explained that, when the government is deciding whether to appeal, the affected agency or department must forward its recommendation to the relevant Assistant Attorney General in the Department of Justice, "who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion." Fed. R. Civ. P. 73 advisory committee's note (1946) (28 U.S.C. App. at 5200 (1958)). "If these departments are rushed," the Committee continued, "the result will be that an appeal is taken merely to preserve the right, or without adequate consideration." *Ibid.*

As the court of appeals recognized, "[that] rationale is obviously inapplicable to the present case, where the government has played no part in the underlying litigation other than to decline to participate in it." Pet. App. 11a. When the government neither intervenes nor actively participates before the district court, it does not conduct the formal institutional decisionmaking process, culminating in a decision by the Solicitor General, that is used to determine whether an adverse district court ruling should be appealed. To be sure, because appellate rulings in declined *qui tam* cases may announce broadly applicable legal principles that will affect the

future enforcement of the FCA, the government often monitors appeals in such cases to determine whether participation by the United States is warranted to protect the federal government's interests. When the government concludes that such participation is appropriate, however, its practice is to file a brief as amicus curiae rather than to assert that it possesses party status.[5]

Consistent with that understanding, the government filed a brief as amicus curiae before the court of appeals in this case. J.A. 18. Moreover, the government has repeatedly participated in such actions as an amicus curiae—not as a party—before this Court.[6] The government has even participated as an amicus curiae at this Court's invitation, see Gov't Cert. Amicus Br., *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) (No. 95-1340), which suggests that this Court has not heretofore regarded the government as a party to declined *qui tam* actions.

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[5] See, *e.g.*, *United States ex rel. Maxwell* v. *Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180 (10th Cir. 2008); *United States ex rel. Sanders* v. *Allison Engine Co.*, 471 F.3d 610 (6th Cir. 2006), vacated, 128 S. Ct. 2123 (2008); *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350 (11th Cir. 2006); *United States ex rel. Hendow* v. *University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), cert. denied, 550 U.S. 903 (2007); *United States ex rel Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. denied, 544 U.S. 1032 (2005).

[6] See, *e.g.*, Gov't Amicus Br., *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123 (2008) (No. 07-214); Gov't Amicus Br., *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005) (No. 04-169); Gov't Amicus Br., *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) (No. 01-1572). By contrast, the government participated as a party in *Stevens* because it had intervened pursuant to 28 U.S.C. 2403(a) in order to defend the *qui tam* provisions of the FCA against constitutional challenge. See Gov't Br. at 8 n.6, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828).

B. The United States' Status As A Real Party In Interest Does Not Make It A Party To All *Qui Tam* Actions For Appellate Purposes

Petitioner contends (Br. 17-19) that the United States is a "party" to a declined *qui tam* suit within the meaning of Rule 4(a)(1)(B) because the government is a real party in interest to this action. Because the government receives the bulk of any monetary recovery in a *qui tam* suit even when it declines to intervene, petitioner is correct that the United States is a real party in interest to such actions. That fact, however, provides no basis for finding Rule 4(a)(1)(B) to be applicable here.

Petitioner's argument ignores the distinction between a "real party in interest" and a "party" to an action. Federal Rule of Civil Procedure 17(a) requires that "[a]n action must be prosecuted in the name of the real party in interest," which means "the person who, according to the governing substantive law, is entitled to enforce the right." 6A *Wright* § 1543, at 334 (2d ed. 1990). The term "real party in interest" therefore has a recognized and settled legal meaning, and omission of the term from Rule 4 "cannot be viewed as simply an oversight." Pet. App. 10a.

Moreover, those terms do have different meanings. As petitioner points out (Br. 18), he brought this action as "a partial assign[ee] of the Government's damages claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). In the case of a partial assignment, "the assignor and assignee each retain an interest in the claim and are both real parties in interest * * * and under Rule 17(a) either party may sue to protect his rights." 6A *Wright* § 1545, at 351-353 (2d ed. 1990). Petitioner cites no authority for the proposition that a real party in interest who

plays no active role in the litigation should be regarded as a "party" to the suit. Petitioner's attempt to equate the two concepts is particularly unavailing in the context of declined *qui tam* actions under the FCA. Although the government's entitlement to a share of any recovery gave it a tangible interest in the outcome of petitioner's suit, the United States expressly declined to exercise its statutory right to intervene and thereby become a party to the litigation.

C. The FCA's Requirement That A *Qui Tam* Suit Be Filed In The Name Of The Government Does Not Make The United States A Party To Such Actions For Appellate Purposes

Petitioner further argues (Br. 20-25) that the United States is a "party" to this suit within the meaning of Rule 4(a)(1)(B) because the action was required to be filed in the name of the government. That argument is incorrect for several reasons.

1. Petitioner asserts that "the United States remains a party to a *qui tam* action in a literal sense, *i.e.*, its name is on the caption." Br. 20 (quoting *Rodriguez* v. *Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 302 (3d Cir. 2009)). It is black-letter law, however, that "the caption is not determinative as to the identity of the parties to the action." 5A *Wright* § 1321, at 388 (3d ed. 2004); *United States* v. *99.66 Acres of Land*, 970 F.2d 651, 659 n.4 (9th Cir. 1992). In any event, the caption of petitioner's complaint does not identify the United States as a party-plaintiff. It identifies petitioner as the party-plaintiff and the United States as an entity for whose benefit the action is brought: "United States Ex Rel Irwin Eisenstein et al." J.A. 23. Because "bringing a claim on a person's behalf and having that person

bring the claim on his or her own are two very different things," *Williams* v. *Bradshaw*, 459 F.3d 846, 848 (8th Cir. 2006), the FCA's requirement that a *qui tam* suit be brought in the name of the United States does not indicate that the government is a party-plaintiff.[7]

That is equally true in other contexts, where the United States can be named in the caption even though it is clearly not a party aligned with the plaintiff. See, *e.g.*, *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966) (state prisoner sought writ of habeas corpus against state warden); *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953) (same); *Ashe* v. *United States ex rel. Valotta*, 270 U.S. 424 (1926) (same); see also *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (alien sought writ of habeas corpus against federal officials).[8] Accordingly, while the FCA requires a

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[7] Contrary to petitioner's assertion (Br. 23-24 n.14), Federal Rule of Civil Procedure 10 adds nothing to the analysis. Although "[t]he title of the complaint must name all the parties," Fed. R. Civ. P. 10(a), it may also name nonparties for whose benefit the action is brought. Petitioner cites no authority for the proposition that one party-plaintiff may make another entity an additional party-plaintiff simply by naming it in the title of a complaint.

[8] One of petitioner's *amici* points (TAF Br. 10) to a pair of circuit court decisions holding that the government is a party to actions under the Miller Act, 40 U.S.C. 3133(b), which authorizes subcontractors to bring actions in the name of the United States. It is far from clear that those cases are rightly decided, given that none of the purposes of the 60-day filing period is implicated by the Act. See *Blanchard* v. *Terry & Wright, Inc.*, 331 F.2d 467, 469-470 (6th Cir.) (holding that "[t]he interest of the United States was merely nominal" under the Miller Act and that "[t]he use plaintiffs were the real parties in interest"), cert. denied, 379 U.S. 831 (1964). In any event, there is no reason to look to the seldom-litigated Miller Act in interpreting the oft-litigated FCA. That is particularly so because the Miller Act contains no analogue to

qui tam action to "be brought in the name of the Government," 31 U.S.C. 3730(b)(1), that does not itself make the government a party.

Nor does Federal Rule of Civil Procedure 17 add anything to the analysis. Rule 17(a)(1) requires that "[a]n action must be prosecuted in the name of the real party in interest," but a relator *is* a real party in interest. So far as Rule 17(a) is concerned, the relator could bring a *qui tam* action in its own name without also joining the United States as the entity for whose benefit the action was brought. The requirement that the government be named in the caption of a relator's complaint is imposed by the FCA, see 31 U.S.C. 3730(b)(1), not by Rule 17(a).

2. Petitioner contends (Br. 21, 23) that the FCA's naming requirement serves an important purpose: it binds the government to the judgment and precludes the government from litigating the same claims against the same defendant in a subsequent suit. It is well-settled, however, that a nonparty can be bound by a judgment and precluded from subsequent civil litigation in certain circumstances. See *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2172-2173 (2008) (discussing six exceptions to the rule against nonparty preclusion); *Devlin*, 536 U.S. at 18 (Scalia, J., dissenting) ("There are any number of persons who are not parties to a judgment yet are nonetheless bound by it."). For instance, "a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Taylor*, 128 S. Ct. at 2172 (brackets in original) (quoting *Richards* v. *Jefferson County*, 517

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the FCA provisions that allow the government to elect whether to "intervene" in a particular suit.

U.S. 793, 798 (1996)). Accordingly, the government can be bound by the judgment in a *qui tam* action even when it elects not to become a party, but instead allows the relator to litigate on its behalf.

3. Finally, even assuming that the FCA's naming requirement might otherwise suggest that the government has party status in a declined *qui tam* suit, that inference is overridden by the clear import of the FCA's text and history taken as a whole. Most importantly, the United States had a statutory right to "intervene" in this case and elected not to exercise that right. The FCA's intervention provisions make clear both that the mere filing of a *qui tam* complaint does not make the government a party to the suit at its outset and that the choice whether to become a party is left to the United States. See pp. 9-15, *supra*. This Court should not conclude that Congress, through the oblique method of requiring the government to be named in the caption, mandated that the United States be treated as a party to this suit notwithstanding its express declination to intervene and its subsequent failure to play any active role in the litigation.

D. The Need For Clarity Does Not Make The United States A Party To All *Qui Tam* Actions For Appellate Purposes

Petitioner contends that "[o]nly a holding in favor of the 60-day deadline will eliminate confusion" among FCA litigants. Br. 25. That concern is misplaced and should not dictate this Court's interpretation of Rule 4.

1. Petitioner contends (Br. 27) that "a literal reading of the rules militates in favor of the 60-day period." But while Rule 4(a)(1)(B) specifies one consequence that follows when the United States is determined to be a party to a lawsuit, it sheds no light on *whether* the Uni-

ted States is a party to a declined *qui tam* action. If the provisions of law germane to that question are better read to indicate that the United States is not a "party" in these circumstances, there is no basis for this Court to adopt a different interpretation simply because some litigants might misunderstand the law. Petitioner's argument logically suggests that, whenever any timing requirement is plausibly susceptible of different interpretations, courts should adopt the most generous (rather than the most persuasive) reading of that requirement. Petitioner cites no authority to support that approach.

In any event, the Court's decision in this case will provide a clear rule going forward as to the applicable deadline for filing a notice of appeal in these circumstances. Petitioner contends (Br. 26) that "there will be a trap for the unwary or a likelihood of confusion even following a holding by this Court in favor of the 30-day rule." That argument is based on petitioner's supposition that, because the FCA requires the government to be named in the caption of a *qui tam* complaint, reasonable litigants will not perceive the kind of ambiguity as to the notice-of-appeal deadline that would alert them to the need for further research. Of course, if this Court agrees with petitioner that the FCA's naming requirement unambiguously manifests Congress's intent to treat the United States as a "party" to a declined *qui tam* suit, the Court will presumably find Rule 4(a)(1)(B) applicable here without regard to the likelihood that a contrary ruling would sow confusion. But if the Court finds that inference to be unwarranted, there is no basis for assuming that future litigants will draw it. This Court's decisions on matter such as filing deadlines are

not so inconsequential as petitioner's argument suggests.

2. It is noteworthy is this regard that the courts of appeals have thus far uniformly held that relators may not litigate *pro se* under the FCA. See *United States ex rel. Mergent Servs.* v. *Flaherty*, 540 F.3d 89, 92-94 (2d Cir. 2008); *Timson* v. *Sampson*, 518 F.3d 870, 873-874 (11th Cir.) (per curiam), cert. denied, 129 S. Ct. 74 (2008); *Stoner* v. *Santa Clara County Office of Educ.*, 502 F.3d 1116, 1127 (9th Cir. 2007), cert. denied, 128 S. Ct. 1728, and 129 S. Ct. 46 (2008); *United States ex rel. Brooks* v. *Lockheed Martin Corp.*, 237 Fed. Appx. 802, 803 (4th Cir. 2007) (per curiam); *United States ex rel. Lu* v. *Ou*, 368 F.3d 773, 775-776 (7th Cir. 2004); *United States* v. *Onan*, 190 F.2d 1, 6-7 (8th Cir.), cert. denied, 342 U.S. 869 (1951).[9] Petitioner's argument thus depends on the prediction that relators' *counsel* will continue to be confused as to the applicable deadline for filing a notice of appeal, "even following a holding by this Court in favor of the 30-day rule." Pet. Br. 26.

That seems unlikely, particularly because the 30-day time limit that the court of appeals found applicable here is not an unusually truncated period for filing a notice of appeals, but is the deadline that governs federal civil actions generally. See Fed. R. App. P. 4(a)(1)(A). Moreover, "filing a notice of appeal is a purely ministerial

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[9] Petitioner was proceeding *pro se* at the time that he filed his notice of appeal. The court of appeals ultimately requested supplemental briefing on two issues: (i) whether petitioner's notice of appeal was timely and (ii) whether petitioner was entitled to proceed *pro se*. J.A. 11-12. The court appointed counsel for petitioner only for the purpose of briefing those issues. J.A. 14. Because the court dismissed the appeal as untimely, it did not reach the issue of whether petitioner could proceed *pro se*.

task," *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000), that can be readily accomplished by relators' counsel within the 30-day filing period. Because petitioner failed to file his notice of appeal within the time prescribed by Federal Rule of Appellate Procedure 4(a)(1)(B), the court of appeals correctly held that his appeal was untimely.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
IRWIN EISENSTEIN

Petitioner,

v.

CITY OF NEW YORK,
MICHAEL BLOOMBERG,
JOHN DOE, JANE DOE,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* PATRICIA HAIGHT AND IN DEFENSE OF ANIMALS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Patricia Haight and In Defense of Animals are relators in a *qui tam* action brought pursuant to the False Claims Act (FCA), pending before the Ninth Circuit Court of Appeals, *United States ex rel. Haight et al. v. Catholic Healthcare West et al.*, Case No. 07-16857. *Amici* filed their notice of appeal 51 days after final judgment. They were following the clearly delineated Ninth Circuit rule in *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996), *cert. denied* 520 U.S. 1211 (1997), permitting any party to a *qui tam* FCA action 60 days to notice an appeal. Ten months after the appeal in *Haight* was filed, the Second Circuit created a circuit split on the issue in *United States, ex rel. Eisenstein v. City of New York,* 540 F.3d 94 (2d Cir. 2008), *cert. granted* 129 S.Ct. 988 (January 16, 2009). The Ninth Circuit stayed proceedings pending its resolution.

Amici filed their *qui tam* action involving false statements in an NIH grant application in the Northern District of California in 2001, and it was transferred to the District of Arizona, Case No. C01-02253-PHX-FJM. A prior appeal in the Ninth Circuit resulted in a significant decision under the FCA jurisdictional bar, 31 U.S.C. §3730(e)(4). *United States*

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[1]All parties have consented to the filing of this brief, and letters of consent are on file. *Amici curiae* represent that their own counsel wrote this brief and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

ex rel. Haight v. Catholic Healthcare West, 445 F.3d 1147 (9th Cir.), *cert. denied*, 127 S. Ct. 725 (2006). After remand, on August 14, 2007, the District Court entered judgment for defendants on cross-motions for summary judgment.

On October 4, 2007 – 51 days after entry of final judgment – Dr. Haight and In Defense of Animals noticed their appeal. At that time, counsel knew about and relied upon the Ninth Circuit rule in *Haycock*, expressly permitting any party to a *qui tam* FCA action 60 days to appeal under Rule 4(a)(1)(B) – whether or not the Department of Justice formally proceeded with the action pursuant to 31 U.S.C. §3730(b)(4).

> It does not matter much whether the unsuccessful party in a *qui tam* action has a thirty day or a sixty day deadline for filing notice of appeal. What matters a great deal is that the unsuccessful party in district court be able to figure out which time period applies, easily, without extensive research, and without uncertainty. A literal interpretation of the rule achieves this important purpose. *Haycock*, 98 F.3d at 1101.

Certiorari had been denied in *Haycock*, and by the time *amici* noticed their appeal, the 60-day rule was at least a decade old. Moreover, it had been followed by the only two subsequent circuits to consider the question. *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th

Cir. 1999).[2] The only contrary authority was the divided Tenth Circuit opinion, prior to the 1986 FCA amendments. *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978).

In addition to what seemed settled precedent, there were obvious reasons to believe the 60 day period applied. Rule 4(a)(1)(B) expressly grants 60 days to *any party* when the United States, its officer or agency is a party; and a *qui tam* action brought in the name of and on behalf of the United States readily appears to qualify. Although the government declined to proceed in *Haight*, in the district court and on appeal the government was served with all pleadings and notices of proceedings, participated in some discovery, and had the right at any time by statute to intervene for good cause. 31 U.S.C. §3730(c)(3). In the Ninth Circuit's caption, "UNITED STATES OF AMERICA, Plaintiff" and "PATRICIA HAIGHT, *ex rel* and In Defense of Animals, *et al.*, Plaintiffs-Appellants" are listed separately. And in *Haight*, 30 days from entry of final judgment, *amici*'s counsel was attending a FCA conference in Washington, D.C., meeting separately with government attorneys assigned to *Haight* to discuss the appeal.

Relators in a *qui tam* case themselves need not qualify as "the United States, its officer or agency"

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[2]Subsequent to the appeal in *Haight*, the Third Circuit joined the Fifth, Seventh and Ninth Circuit rule of 60 days. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 300-02 (3d Cir. 2008).

under Rule 4(a)(1)(B). Although the extended period is designed to afford the government more time to protect its interests on appeal, the rule states "the notice of appeal may be filed by *any party* within 60 days" (emphasis supplied), so long as the government is a party. In *qui tam* FCA cases where the government declines to proceed under 31 U.S.C. §3730(b)(4), the government clearly retains an interest in preserving the 60-day time period for appeals. *See, e.g., United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391 (9th Cir. 1992) (government properly intervened within the time to appeal in order to appeal a final judgment in a declined *qui tam* FCA case); *Searcy v. Phillips Electronics*, 117 F.3d 154 (5th Cir. 1997) (government has standing to take an appeal in a declined *qui tam* FCA case as a real party in interest even without formal intervention).

ARGUMENT

1. Given the Dozen Years of Circuit Rulings Granting Sixty Days to Appeal Declined *Qui Tam* FCA Actions, the Shortened Time Period Prescribed By the Second Circuit Would Create a Trap for Both the Unwary and Learned.

Principal among the reasons why the Third, Fifth, Seventh and Ninth Circuits adopted the sixty-day period is the desire to have bright-line procedural rules readily apparent to litigants and their counsel. What mattered "a great deal" to the Ninth Circuit was a holding that would enable unsuccessful litigants to "be able to figure out which time period applies, easily, without extensive research, and without uncertainty." *Haycock*, 98 F.3d at 1101. Taking Rule 1 as "a charge

to resist reading the Rules in a manner that lays traps for the unwary," the Fifth Circuit construed Rule 4(a)(1) as providing the longer time period "to reduce uncertainty in the already difficult conceptual terrain of *qui tam* suits." *Russell*, 193 F.3d at 308. *See also Rodriguez*, 552 F.3d at 302 ("Applying the shorter deadline may confuse litigants who, based on a literal reading on Rule 4(a)(1), assume that the longer deadline applies. It is especially important, when interpreting procedural rules, that we avoid any reading likely to cause confusion"); *Lu*, 368 F.3d at 775 ("These decisions also note the trap for the unwary that would be created by giving Rule 4(a)(1) a nonliteral interpretation, and the desirability of avoiding uncertain inquiries (what is the named party's real interest in the case?) to determine jurisdiction").

The shortened time period imposed by the Second Circuit in *Eisenstein* would not only confuse the "unwary," it would upend the settled expectations of those *vigilant* litigants – such as *amici* here – who relied upon years of consistent Circuit treatment, in determining when to notice the appeal. Although this Court has the mission to resolve circuit splits and lay down rules for litigants to follow going forward, this particular dispute does not come on a clean slate. Instead, twelve years after *certiorari* was denied in *Haycock*, litigants in declined *qui tam* actions have followed settled procedure in assuming they had 60 days to notice their appeal. Reliance on settled case authorities clearly entitling any party in a *qui tam* action to the longer appeal period stands among and above the many reasons – set forth by Petitioner and

discussed in the Circuit opinions – to hold the United States is a party for purposes of Rule 4(a)(1). Drawing a line now at 30 days would unfairly and inappropriately unsettle those expectations.

2. Application of the Shorter Time Period in *Eisenstein* Would Impose an Impermissible Retroactive Change in the Mandatory Procedural Rule in Those Jurisdictions Where Settled Law Permits Any Party to a *Qui Tam* FCA Case Sixty Days to Appeal.

In the event that this Court determines the United States is not a party in declined *qui tam* FCA actions for purposes of Rule 4(a)(1)(B), and therefore adopts the shorter 30 day period for noticing appeals, it should not apply the new rule to the case of *Eisenstein*; instead it should announce the rule and prescribe it prospectively only. Application to the case at bar would require retroactive application to all pending cases. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law, and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). That would include cases pending in the Third, Fifth, Seventh and Ninth Circuits, where litigants have been following established circuit law permitting appeals in *qui tam* actions up to 60 days.

Retroactive application of a shortened appeal time period would upend settled expectations and unfairly deprive *amici* relators of their chance to have the merits of their case heard by the Ninth Circuit on appeal. *Amici* were following controlling Circuit law in believing they had 60 days to notice their appeal. Any change to that rule resulting in a shortened appeal period should be applied prospectively only.

Prospective application for a rule shortening the time for noticing an appeal was the result in the Ninth Circuit decision remarkably on point. *See George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (*en banc*).

> "Applying our decision retroactively would be contrary to fundamental principles of fairness and due process of law, and would call into question the very integrity of this court's processes. Announcing a rule that allows litigants a specific period of time within which to appeal and then several years later declaring that we've changed our minds and will not recognize appeals that were filed within the proscribed period would be carrying the 'gotcha' principle beyond all previous limits. It would also be wholly unprecedented. ...
>
> "Considerations of fairness that presumptively prohibit retroactive application of the law are essential 'in a free, dynamic society [where] creativity . . . is fostered by a rule of law that gives people confidence about the consequences

of their legal actions.' *Id.* For that reason, among others, courts are reluctant to "sweep away settled expectations suddenly . . . ." *Id.* It would be difficult to imagine a more compelling circumstance for abiding by established legal rules than is presented in the case before us - a case in which we are asked to hold that time limits established by court decisions construing the Federal Rules of Appellate Procedure may be shortened without prior notice to litigants, and that the new time limits may be applied retroactively to pending appeals that were timely filed under our court-announced rule. The consequence of such a holding would be that litigants who complied with our rules by timely filing their appeals in accordance with our instructions would lose their rights to appeal, thereby forfeiting whatever underlying interests may have been affected by adverse district court decisions. Moreover, we are asked to hold that we are compelled to reach that result - a result that would appear to be unconscionable to most reasoning persons whether learned in the law or not." *George v. Camacho*, 119 F.3d at 1396-97.

"Rules are intended to provide certainty and to guide parties' actions. Making a rule shortening time for filing retroactive is inconsistent with both of these

> objectives. The ordinary processes of the law and the interests of justice are far better served by requiring courts to determine by objective standards - by examining the nature of the rule itself - how the type of change their decision will work should be made: prospectively or retroactively. ...
>
> "To propound a rule that prescribes a period of time within which litigants are free to appeal, and then to determine subsequently that the rule is erroneous and dismiss appeals that complied with it when filed, would undermine confidence in the judicial system. Moreover, contrary to the very objectives of a fixed time period for filing, applying our changed rule retroactively would unsettle matters that had already been settled, cast into doubt the practice of relying on the court's construction of the federal rules, and penalize parties whose conduct faithfully conformed to our determinations." [*George v. Camacho*, 119 F.3d at 1404.]

Although Rule 4(a)(1) has been described as "mandatory and jurisdictional," *United States v. Sadler*, 480 F.3d 932 (9th Cir. 2007), prospective application of a change in the rule here would be entirely appropriate. This Court in *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) stated that jurisdictional rulings must always be applied

retroactively. Unanimous opinions from this Court in recent years, however, have admonished against indiscriminate use of the word "jurisdiction" and the "erroneous jurisdictional conclusions"that flow therefrom. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); *Eberhart v. United States*, 546 U.S. 12, 17-18 (2005) (*per curiam*); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). *See Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 2369-70 (2007) (dissenting opinion).

The crux of the trigger for the jurisdictional label lies in the extent to which the procedural rule is a component of the statutory grant. *See Sadler*, 480 F.3d at 936 ("The distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute"). Here, both Rule 4(a)(1)(B) and the statute – 28 U.S.C. §2107(b) – confer subject matter jurisdiction to hear appeals that are filed within 60 days of final judgment when the government is a party.[3] Federal courts clearly possess the

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[3]Rule 4(a)(5) and 28 U.S.C. §2107(c) also confer jurisdiction (in the sense of the power to *hear* the matter) in cases noticed for appeal within 30 days after the running of the initial appeal period, where good cause or excusable neglect exists. Understanding the government to be a party for purposes of Rule 4(a)(1)(B) in a *qui tam* action would constitute such "good cause." That is particularly true in *Haight*, as *amici*'s understanding was based on settled circuit law. *See George*, 119 F.3d at 1410 (dissenting opinion) (party relying on overturned prior Circuit decision

(continued...)

authority to determine whether the government is or is not a party under both the rule and the statute. Any change in the governing interpretation of that aspect of the procedural rule cannot be mantled with authority of the original statutory grant. Instead, changing interpretations of both the rule and the statute can be subject to retroactivity analysis set forth in *George*.

Bowles v. Russell, 551 U.S. 205, 127 S.Ct. 2360 (2007) does not require a different conclusion. That case involved reliance on a district court's erroneous grant of 17 days to file an appeal reopened for lack of notice pursuant to Rule 4(a)(5) and 28 U.S.C. §2107(c). There, both the rule and statute permit a reopening of only 14 days. In contrast, here, there was no attempt to waive or correct omission of a clear statutory requirement. Moreover, while any litigant realizes that a district court's order might be subject to reversal on appeal, litigants – especially those in the Third, Fifth, Seventh and Ninth Circuits – relied on settled circuit law when they filed their appeals within 60

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[3](...continued)
would be "entitled to file her notice of appeal under a theory of excusable neglect; what, after all, could be more excusable than relying on a clear pronouncement of the court of appeals?"). In light of the jurisdictional power afforded by §2107(c), federal courts have jurisdiction over appeals in *qui tam* FCA cases filed within 60 days of final judgment even if the 30-day rule of §2107(a) applies, so long as reliance on settled law or reasonable interpretation of the *qui tam* FCA statute affords the basis for finding good cause and excusable neglect.

days. With the case in *Haight*, *amici* had relied on Ninth Circuit precedent already a decade old. That is not the type of settled expectations that can be fairly reworked after-the-fact resulting in the denial of the parties' day in court.

CONCLUSION

For the foregoing reasons, *Haight amici* urge the Court to reverse the Second Circuit Court of Appeals, and adopt the 60 day rule for noticing appeals in declined *qui tam* cases. In the alternative, should the Court choose to overturn the Third, Fifth, Seventh and Ninth Circuits on their interpretation of Rule 4(a)(1)(B), *Haight amici* ask the Court to make its ruling prospective only.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-660

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL. IRWIN EISENSTEIN,
Petitioner,

v.

CITY OF NEW YORK, MICHAEL BLOOMBERG, JOHN DOE, JANE DOE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where the United States elects not to proceed with a *qui tam* action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a "party," or the 30-day period provided for in Fed. R. App. P. 4(a)(1)(A)?

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INTEREST OF *AMICUS CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and as *amicus curiae*, and has provided testimony before Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief and that letters reflecting the consent of both petitioner and respondents have been filed with the Clerk.

SUMMARY OF ARGUMENT

Federal Rule of Appellate Procedure 4(a)(1) provides that the time to file a notice of appeal in a civil case is thirty days after the entry of the judgment or order appealed from, except that when the United States is a party to a case, any party to that case has sixty days to file a notice of appeal. See also 28 U.S.C. § 2107(a), (b).[2] The question presented in this case is whether for purposes of this rule the United States is a party to a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, brought by a private individual on behalf of the Government and in the Government's name, when the Government initially declines to intervene and take over the case as authorized by the Act.

Regardless of whether the Government initially intervenes in a False Claims Act *qui tam* action, the Government remains the real party in interest – the United States is named in the caption of every *qui tam* action, liability is based upon harm to the United States, and any damages and penalties

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[2] Federal Rule of Appellate Procedure 4(a)(1) provides in pertinent part:

> (A) In a civil case, except as provided in Rule[] 4(a)(1)(B), . . . the notice of appeal . . . must be filed . . . within 30 days after the judgment or order appealed from is entered.
>
> (B) When the United States . . . is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

are awarded to the United States with a reward paid from that recovery to the person who initiated the case on the Government's behalf. And regardless of whether the Government joins the case at the outset, the Act provides that the Government retains a significant role, including the right to object to the settlement or dismissal of its claim, and the right to intervene, after having initially opted not to do so, upon a showing of good cause.

Given the United States' unique role in False Claims Act *qui tam* actions, the potential for confusion from giving Federal Rule of Appellate Procedure 4(a) a non-literal reading, and the goal of the modern Federal Rules of Civil Procedure to ensure that procedural rules do not become procedural traps, the Court should hold that the United States is a party to a False Claims Act *qui tam* action for purposes of Federal Rule of Appellate Procedure 4(a) such that the sixty-day time for appeal applies to all parties to such an action. That reading of the rule serves the purposes of the False Claims Act and the Federal Rules of Civil Procedure, and causes no prejudice to any party because Federal Rule of Appellate Procedure 4(a) provides that all parties to a case involving the United States have the same sixty-day time limit to appeal.

ARGUMENT

I. THE FALSE CLAIMS ACT PROVIDES A UNIQUE ROLE FOR THE GOVERNMENT IN A *QUI TAM* ACTION WHETHER OR NOT THE UNITED STATES ACTIVELY PARTICIPATES IN THE CASE

Congress enacted the False Claims Act ("FCA") in 1863 to combat rampant procurement fraud during the Civil War.[3] The Act was modeled after informer suits that had been used in England, and early in the history of this country. *See United States ex rel. Marcus v. Hess*, 317 U.S. 547, 542, n.4 (1943). By harnessing the information and resources of private individuals to bring suit in the name of the United States and on its behalf, the Act sought to enhance the Government's ability to combat fraud against the United States Treasury. Congress has twice amended the Act, once in 1943 and again in 1986, each time refining the intertwined roles of the Government and the private persons who initiate cases on its behalf.

In its current form, the False Claims Act provides that an action may be commenced in one of two ways. First, the Attorney General may bring a civil action, 31 U.S.C. § 3730(a). Second "a person" may bring a civil action "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). When a person brings an action for the United

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[3] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878); *see also United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); S. Rep. No. 345, 99th Cong., 2d Sess. (1986), at 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

States, the statute provides that the action "shall be brought in the name of the Government." *Id.* Such an action is known as a "*qui tam*" action.[4]

The False Claims Act provides that when a person initiates a case on behalf of the United States, the complaint must be filed under seal and served on the Government, but not the defendant. The statute also provides the Government sixty days to investigate the complaint's allegations before making an election whether to proceed with the case. 31 U.S.C. § 3730(b)(2). The Government may request that a court extend the period that the case remains under seal to provide the Government additional time to investigate. 31 U.S.C. § 3730(b)(3). Upon expiration of the sixty-day period or any extension, the Government must make an election whether to proceed with the action. If the United States elects to proceed, it has primary responsibility for the conduct of the litigation. 31 U.S.C. § 3730(b)(4)(A). If the Government elects not to proceed, the person initiating the action shall have the right to conduct the action. 31 U.S.C. § 3730(b)(4)(B).[5]

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[4] "*Qui tam*" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means he who sues for himself as well as for the king. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n.1 (2000).

[5] When the FCA was first enacted, the Government had no right to participate in an action brought by a relator, Act of March 2, 1863, ch. 67, 12 Stat. 296, although the case could not be settled without the Government's consent. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 n.11 (1943). When Congress amended the statute in 1943, Congress provided for the first time that the Government could take over a case initiated by a relator. Act of December 23, 1943, ch. 377, 57 Stat. 608. Under the Act as amended in 1943, if the Government took over the suit, the relator had no continuing

Section 3730(c) sets forth "the rights of the parties to qui tam actions." 31 U.S.C. § 3730(c). If the Government proceeds with the action, it has primary responsibility for conducting the action and shall not be bound by an act of the person bringing the action, although the person has a right to continue as a party to the action, subject to specified limitations. 31 U.S.C. § 3730(c)(1). The Government may dismiss the action, 31 U.S.C. § 3730(c)(2)(A), settle the action, 31 U.S.C. § 3730(c)(2)(B), or seek to restrict the relator's participation under certain circumstances. 31 U.S.C. § 3730(c)(2)(C).

If the Government declines to proceed with the action, the person initiating the action has the right to conduct the action. 31 U.S.C. § 3730(c)(3). At its request, the Government may be served with the copies of all pleadings and deposition transcripts for the purpose of monitoring the case. *Id.* The court, without limiting the rights of the person who initiated the action, may permit the Government to intervene at a later date upon a showing of good cause. *Id.* The right to join at a subsequent tine was intended to ensure that the initial decision did not prevent the Government from asserting its interests in the litigation at a later time. "Conceivably, new evidence discovered after the first sixty days of the litigation could escalate the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment or making it difficult for the qui tam relator to litigate alone." S. Rep. No. 99-345, at 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

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role in the litigation. *Id.* If the Government declined to intervene, it had no opportunity to join again at a later date. The 1986 amendments further expanded the Government's role.

Whether or not the Government proceeds with the action, the Government may seek restrictions on discovery by the relator upon a showing that the relator's actions would interfere with the Government's investigation or prosecution of a matter arising out of the same facts. 31 U.S.C. § 3730(c)(4).

Finally, the Government may elect to pursue its claim through any alternate remedy available to it. 31 U.S.C. § 3730(c)(5). If the Government makes such an election, the person initiating the action has the same rights in that proceeding as the person would have had if the *qui tam* action had proceeded. *Id.* In any such alternate proceeding, "[a]ny findings of fact or conclusions of law . . . shall be conclusive on all parties to an action." *Id.*

II. THE GOVERNMENT IS THE REAL PARTY IN INTEREST IN A *QUI TAM* ACTION REGARDLESS OF WHETHER IT JOINS THE CASE INITIALLY

Prior to the decision of the Second Circuit below, several appellate courts had concluded that the United States is a party for purposes of Federal Rule of Appellate Procedure 4(a) and that the sixty-day time period for appeals in cases in which the United States is a party applies. The Fifth, Seventh, and Ninth Circuits had concluded that the sixty-day rule applied to all *qui tam* actions.[6] The Tenth Circuit, in a decision prior to the 1986 amendments

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[6] *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Company*, 98 F.3d 1100 (9th Cir. 1996).

to the False Claims Act, concluded that the general thirty-day rule applied, and a later panel considered itself bound by that decision.[7] After the Second Circuit's decision below, the Third Circuit joined the majority in concluding that the sixty-day rule applies to all *qui tam* actions.[8] The reasoning of the appellate courts that have concluded that the sixty-day time period applies to *qui tam* actions comports with a literal reading of the rule and serves both the purposes of the False Claims Act and the Federal Rules of Civil Procedure. The decision below erred in discounting the ever present interest of the United States in a *qui tam* action and the Government's ongoing role regardless of its active participation in conducting the case.

A. The Claim in a False Claims Act *Qui Tam* Action Belongs to the United States

While the United States clearly is a nominal party to a *qui tam* action, in the sense that its name appears in the caption, it is much more than that. The gravamen of a cause of action under the False Claims Act, regardless of whether the case is initiated by the United States or a private individual, is that the United States Treasury has been harmed or threatened with harm because of the conduct of the defendant. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529

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[7] *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1978); *United States ex rel. Shaw v. AAA Engineering & Drafting, Inc.*, 138 Fed. Appx. 62 (10th Cir. 2005).

[8] *United States ex rel. Rodriguez v. Our Lady of Lourdes Medical Center*, 552 F.3d 297, 302 (3rd Cir 2008).

U.S. 765, 774 (2000).[9] By statute, the private person who brings a *qui tam* action is given a partial assignment of the Government's claim, but there is no question that the claim itself belongs to the Government. *Stevens,* 529 U.S. at 774. Any recovery under the statute is based upon harm to the United States, and any recovery belongs to the United States, with a statutory bounty being paid from that recovery to the private individual who prosecuted the case on the United States' behalf. 31 U.S.C. § 3730(d)(providing that award shall be paid from the "proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action"). The False Claims Act protects the United States' interest by expressly providing that no *qui tam* action may be settled or dismissed without its consent. 31 U.S.C. §§ 3730(b)(1); 3730(c)(2)(B).

Thus, the United States' role as a real party in interest is far more significant than its role in Miller Act cases, where the United States has been considered a party for purposes of Rule 4(a), as well as for other jurisdictional purposes. Under the Miller Act, suppliers to government contractors may bring an action in the name of the United States to recover payments due them. 40 U.S.C. § 1331 (formerly 40 U.S.C. § 270(a)). In such a case, as in a False Claims Act *qui tam* action, the United States'

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[9] *United States ex rel. Marcus v. Hess*, 317 U.S. at 551 ("We think the chief purpose of [the False Claims Act] was to provide for restitution to the government of money taken from it by fraud, and that the device of [a civil penalty plus multiple damages] was chosen to make sure that the government would be made completely whole.").

name appears in the caption and the Government could bring its own action to recover the funds. Yet unlike a False Claims Act *qui tam* action, the Government has no role in a Miller Act case and no stake in the recovery pursued by the private person. Nevertheless, courts have concluded that the United States is both a nominal party and a real party in interest in such a case, and have concluded that Federal Rule of Appellate Procedure 4(a)'s sixty-day time limit applies to all parties to such a case. *See United States ex rel. Custom Fabricators, Inc. v. Dick Olson Constructors, Inc.*, 823 F.2d 370, 371 (9th Cir. 1987); *Barnard-Curtiss Co. v. United States of America, for the Use and Benefit of D.W. Falls Construction Co.*, 252 F.2d 94 (10th Cir.1958). This Court also has concluded that the United States is a real party in interest in such cases. *See United States Fidelity and Guaranty Company v. United States for the Benefit of Kenyon*, 204 U.S. 349 (1907); *see also Davison Bros. Marble Co. v. United States ex rel. Gibson*, 213 U.S. 10 (1976). Based on the treatment of Miller Act cases, the Ninth Circuit concluded in *United States ex rel. Haycock v. Hughes Aircraft Company*, 98 F.3d 1100 (9th Cir. 1996), that the United States is a party for purposes of Federal Rule of Appellate Procedure 4, given the far greater stake and role in the case that the United States has in a False Claims Act *qui tam* action than in a Miller Act case. *Id.* at 1102.

Although the Tenth Circuit in *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1978) rejected the analogy to the Miller Act cases, it misconstrued both the nature of the Miller Act cases and the False Claims Act *qui tam* actions. The Court viewed the United States as a real party in interest in a Miller

Act case, *id.* at 1328, but the United States has no stake and no role in such cases. And while the Tenth Circuit concluded that the United States was merely a nominal party in False Claims Act *qui tam* actions, *id.* (observing that proceeding in the government's name was a "mere statutory formality") the court did not acknowledge that the claim in such a case belongs to the United States, which receives most of the recovery and which retains some control over disposition of the case. But *Petrofsky* was decided before 1986, when Congress substantially amended the Act and expanded the Government's control over declined cases by expressly authorizing the Government to intervene in a *qui tam* action after having initially declined to do so. *See* 31 U.S.C. § 3730(c)(3).[10] *Compare Petrofsky*, 588 F.2d at 1328 (observing there is no support for "a continuing governmental interest in these suits after the United States has opted out.")

The paramount interest of the United States in a *qui tam* action was central to the Seventh Circuit's conclusion that a *qui tam* action is a case in which the United States is a party for purposes of Federal Rule of Appellate Procedure 4(a). In an opinion by Judge Posner, the Seventh Circuit observed that "even if the government decides not to annex the lawsuit," it has a substantial ongoing interest, including receiving copies of all pleadings and

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[10] When the Tenth Circuit in *Shaw* found no relevant change warranting reexamination of *Petrofsky* it did not evaluate the 1986 amendments' expansion of the Government's control over declined cases. *See Searcy v. Philips Electronics N.A. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997) (observing that since the original Act "Congress has both created and expanded the government's power to assume control of the litigation").

depositions, freedom to pursue alternate remedies and receives the lion's share of any recovery regardless of who conducts the litigation.." *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004). The Seventh Circuit also observed that the United States must be considered a party because the relator's standing was dependent upon the United States' status. Although that observation was made before this Court's decision in *Stevens,* it is fully consistent with it, as this Court also concluded that the relator's standing is derivative of the United States' claim. *See Stevens,* 529 U.S. at 774 (relators have standing as partial assignees of the United States' claim to recovery).[11]

The Court below discounted the Government's stake in a *qui tam* action, *see United States ex rel. Eisenstein v. City for New York*, 540 F.3d 94, 101 (2d Cir. 2008) (observing that it is a "'merely a statutory formality' that the relator brought the suit in the name of the United States"), focusing instead on far more variable factors such as the level of participation exercised in a particular case. *Id.* at 100 ("What is of import is that the United States played no role in this matter before the district court."). But as the Seventh Circuit recognized in rejecting a similar argument, rules of timing for

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[11] "'Although the partial assignment allows the relator asserting the government's injury to satisfy the requirements of Article III standing, it does not transform a qui tam action into the relator's "own case" . . . . The FCA makes clear that notwithstanding the relator's statutory right to the government's share of the recovery, the underlying claim of fraud always belongs to the government.'" *United States ex rel. Lemmon v. Envirocare of Utah*, 2008 U.S. Dist. LEXIS 29619 (D. Utah Apr. 9, 2008) (holding that the United States' claim survives the death of the relator) (citations omitted).

taking an appeal should not turn on variable questions like the government's participation in a particular case. *See Ou*, 368 F.3d at 775 (rejecting suggestion in *Petrofsky* that a court could take into account the circumstances of an individual case as "a very curious qualification... to graft on to a jurisdictional statute."); *see also Petrofsky*, 588 F.2d at 1329 (Logan, J., dissenting).

B. The United States' Stake and Role in a *Qui Tam* Action Does Not End When it Initially Declines to Intervene

While the court below viewed the United States' participation in a *qui tam* action as an either/or proposition, and dismissed the Government's ultimate control over the disposition of the case as merely "a sensible requirement," *Eisenstein*, 540 F.3d at 98, the Government's ongoing oversight over *qui tam* cases and ability to settle or dismiss the case demonstrate that it is far more than a nominal party. The Government's role in a *qui tam* action is a fluid one. The initial decision to decline to join is not dispositive of the Government's future role in the case, or its view of the merits. *See United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 455 (5th Cir. 2005) ("The statute... does not require the government to proceed if its investigation yields a meritorious claim."); *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 974 (7th Cir. 2002), *aff'd on other grounds*, 538 U.S. 119 (2003); S. Rep. No. 99-345, at 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

III. APPLYING THE SIXTY-DAY RULE TO FALSE CLAIMS ACT *QUI TAM* ACTIONS SERVES THE PURPOSES OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FALSE CLAIMS ACT

While the United States is both a nominal party and a real party in interest, applying the sixty-day rule to all parties to a *qui tam* action also serves both the purposes of the False Claims Act and the Federal Rules of Civil Procedure.[12] The reading adopted by most appellate courts ensures that there is adequate time for the United States to consult the relevant decision-makers concerning its interests in the appeal of a judgment or order affecting its claim in appropriate cases, and it avoids the confusion that flows from the fact that the case is brought in the name of the United States and the United States' name appears in the caption.

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[12] There is no need to treat the United States as a party for all purposes under the Rules of Civil Procedure. When the United States does not conduct the litigation and allows the relator to prosecute the case without it, the United States should not be treated as a party for purposes of discovery. For purposes of appeal, a different question is presented – namely whose rights are being compromised.

A. The Purposes of the Sixty-Day Rule are Fully Applicable to *Qui Tam* Actions

The report of the Advisory Committee on Rule 73(a), the predecessor to Federal Rule of Civil Procedure 4(a), explains that the purpose of providing a longer time to file a notice of appeal in a case in which the United States is a party is to account for the slower decision-making process of the United States:

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as

> it is easier to refrain from an appeal than to dismiss it.

Report of Proposed Amendments To Rules Of Civil Procedure For The District Courts Of The United States, *reprinted in* 5 F.R.D. 433 (1945). And in order to prevent unfairness to the other parties to a case in which the United States was a party, the sixty-day rule applies to all parties to such a case.[13]

Those purposes are served by applying the sixty-day rule to *qui tam* actions, regardless of whether the United States has already joined the case. While the Court below dismissed this purpose as "obviously inapplicable," there are many circumstances in which it is in the United States' interest for relators to consult with the United States before filing a notice of appeal from a judgment or order affecting the United States' claim to enable the United States itself to determine whether to appeal or intervene. Because the United States has a broader perspective than a *qui tam* relator in an individual case, it may have a stake in challenging an order or judgment that the relator does not, or because it was not involved in conducting a case, may subsequently determine that an order or judgment has more far-reaching implications than it initially thought. *See, e.g., United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391 (9th Cir. 1992); *Searcy v. Philips Electronics N.A. Corp.*, 117 F.3d 154 (5th Cir. 1997); S. Rep. No.

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[13] *See id.* ("Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties.").

99-345, at 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. The United States may also need to protect its interests when a relator is unexpectedly dismissed from a case. *See, e.g., United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 486 F. Supp. 2d 1233 (D. Colo. 2007) (dismissing *qui tam* action for lack of jurisdiction after jury award of damages and declining to permit the United States to intervene), *reversed,* 540 F.3d 1180 (10th Cir. 2008). As the Third Circuit observed, the United States retains the right to intervene even on appeal and can appeal an adverse decision without formally intervening. Thus, the government's decision-making process "continues to be relevant to determining how long the right to appeal should remain available." *Lourdes*, 552 F.3d at 302.

B. Applying the Sixty-Day Rule Avoids Confusion

As most of the appellate courts that have considered this issue have concluded, applying the sixty-day rule avoids confusion that can arise from litigants applying a literal reading of the rule, given that the United States appears in the caption to the case and that the United States' omnipresent role in *qui tam* actions. *See United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999) (observing that the language of the False Claims Act is likely to lead relators to conclude that the United States is a party and "the government is ever present in *qui tam* suits in ways that promote confusion."); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (2004) (avoids confusion that would be created by giving the rule "a nonliteral interpretation"). The Federal Rules of Civil Procedure are generally to be construed to "secure

the just, speedy, and inexpensive determination of every action and proceeding." Federal Rule of Civil Procedure 1. To the extent there is any ambiguity in whether the United States, which is both a nominal party and a real party in interest, is a "party" for purposes of the timing of an appeal, the rule should be construed to avoid confusion. Applying the sixty-day rule, as most appellate courts have done, accomplishes this, and causes no harm to other parties because all parties receive the benefit of the sixty-day rule. While the court below observed that "counsel of minimal competence" would question whether the United States was a party and ensure that an appeal was filed within thirty days, not only *pro se* relators, but also defendants and several appellate courts have readily concluded that the United States is a party in the literal sense for purposes of Rule 4. *See Ou, 368 F.3d at 775; Russell,* 193 F.3d at 307-08; *Haycock,* 98 F.3d at 1002; *United States ex rel. Rodriguez v. Our Lady of Lourdes Medical Center,* 552 F.3d 297, 302 (3rd Cir 2008); *see also United States ex rel. Shaw v. AAA Engineering & Drafting Inc.*, 138 Fed. Appx. 62 (5th Cir. 2005) (rejecting claim that defendant's cross-appeal was timely).[14] And although the Court found little evidence of confusion, given the few number of times this has arisen "in the many decades" in which Rule 4(a) and the False Claims Act coexisted, *see Eisenstein*, 540 F.3d at 101, that observation ignores that only in the last two decades has the False

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[14] The court in *Shaw* concluded that it was compelled to follow the Tenth Circuit's previous holding in *Petrofsky*, although it noted that "there are valid arguments in favor of applying the sixty-day rule in *qui tam* cases such as this one." 138 Fed. Appx. 62.

Claims Act been revitalized, resulting in a significant increase in *qui tam* actions, and even that increase did not occur immediately. Prior to 1986, statutory barriers enacted in 1943 substantially decreased the number of *qui tam* actions. *United States ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994). Since 1986, the question of how to apply Rule 4(a) to declined *qui tam* actions has arisen and been resolved in several circuits, eliminating any confusion in those circuits. There could be many explanations for why the issue has not been joined in other circuits, including that even where parties conclude that they have sixty days to appeal, they do not necessarily need the full amount of time.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that the United States is a party for purposes of Federal Rule of Appellate Procedure 4(a).

Respectfully submitted,

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